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SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1951

## No. 431

TESSIM ZORACH AND ESTA GLUCK,
APPELLANTS,

*vs.*

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE AND JAMES MARSHALL, CONSTITUTING THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED NOVEMBER 16, 1951

PROBABLE JURISDICTION NOTED DECEMBER 11, 1951

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# Supreme Court of the State of New York

APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of the Application of

TESSIM ZORACH and ESTA GLUCK,
*Petitioners-Appellants,*

for an order pursuant to Article 78 of the Civil Practice Act,

*against*

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE, and JAMES MARSHALL, constituting the Board of Education of the City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,
*Respondents,*

directing them to discontinue certain school practices,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,
*Intervenor-Respondent.*

## Statement Under Rule 234

This proceeding was commenced by the service of a verified petition and notice of motion on July 27, 1948.

On the original return day of said petition and notice of motion at Special Term, Part I, Supreme Court, Kings County on August 4, 1948,

respondent Commissioner of Education moved to dismiss the petition in so far as it was addressed to and sought an order against respondent Commissioner of Education on the ground that the Supreme Court, Kings County, to that extent, was without jurisdiction to entertain this proceeding, or in the alternative to have the proceeding transferred to the Supreme Court, Albany County. By decision published December 30, 1948 and by order entered February 5, 1949, Mr. Justice George J. Beldock denied that motion (86 N. Y. S. 2nd 17); which decision and order were unanimously affirmed on appeals to the Appellate Division, Second Department, and the Court of Appeals (275 App. Div. 774; 300 N. Y. 613).

Pending said appeals this proceeding was otherwise stayed by court orders, except that by order entered herein on June 20, 1949 The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics was granted leave to intervene (195 Misc. 531).

The answer of respondent Board of Education of the City of New York was served on January 9, 1950. The answer of respondent Commissioner of Education of the State of New York, was served on January 9, 1950. The answer of intervenor-respondent, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, was served on June 24, 1949.

The reply of petitioners to matter set forth in the answer of intervenor-respondent was served on May 9, 1950.

*Statement Under Rule 234*

The names of the original petitioners are Tessim Zorach and Esta Gluck.

The names of the original respondents are Andrew G. Clauson, Jr., Maximilian Moss, Anthony Campagna, Harold C. Dean, George A. Timone, and James Marshall, constituting the Board of Education of the City of New York, and Francis T. Spaulding, Commissioner of Education of the State of New York. The name of the intervenor-respondent is The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics.

Petitioners' attorney is Kenneth W. Greenawalt, Esq. The attorney for respondent Board of Education is John P. McGrath, Esq., Corporation Counsel of the City of New York. The attorney for respondent Commissioner of Education is Nathaniel L. Goldstein, Esq., Attorney General of the State of New York. The attorney for intervenor-respondent is Charles H. Tuttle, Esq.

There has been no change in parties or attorneys herein since the commencement of the action, except for the intervention of The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics; and except that Francis T. Spaulding has died during the pendency of this proceeding. No successor Commissioner of Education has been substituted for him.

10 **Notice of Appeal to the Appellate Division**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application of

TESSIM ZORACH and ESTA GLUCK,
*Petitioners,*

for an order pursuant to Article 78 of the Civil Practice Act,

11 *against*

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE, and JAMES MARSHALL, constituting the Board of Education of the City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,
*Respondents,*

directing them to discontinue certain school practices,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS
12 AND ROMAN CATHOLICS,
*Intervenor-Respondent.*

SIRS:

PLEASE TAKE NOTICE that the petitioners above-named hereby appeal to the Appellate Division, Supreme Court, Second Department, from the final order herein signed by the Hon. Anthony J. DiGiovanna, a Justice of this Court, on the 23rd day of June, 1950 and entered in the office of the Clerk of the County of Kings on the 24th

*Notice of Appeal to the Appellate Division* 13

day of June, 1950; and the petitioners appeal from each and every part of said order as well as from the whole thereof.

Dated: New York, New York, July 19, 1950.

Yours, etc.,

KENNETH W. GREENAWALT, Esq.,
Attorney for Petitioners,
One Wall Street,
New York 5, New York.

14

To:

Hon. JOHN P. McGRATH,
Corporation Counsel,
Attorney for the Board of Education
of the City of New York, Respondent,
Municipal Building,
New York, New York.

Hon. NATHANIEL L. GOLDSTEIN,
Attorney General,
Attorney for Commissioner of Education
of the State of New York, Respondent,
80 Centre Street,
New York, New York.

15

CHARLES H. TUTTLE, Esq.,
Attorney for The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics,
Intervenor-Respondent.

FRANCIS J. SINNOTT,
Clerk of the County of Kings,
Hall of Records,
Brooklyn, New York.

16 **Final Order Appealed From**

At a Special Term, Part I, of the Supreme Court, held in and for the County of Kings, at the Municipal Building, Court and Joralemon Streets, Borough of Brooklyn, City of New York, on the 23rd day of June, 1950.

Present—Hon. ANTHONY J. DIGIOVANNA, Justice.

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17 In the Matter of the Application of

TESSIM ZORACH and ESTA GLUCK,

*Petitioners,*

for an order pursuant to Article 78 of the Civil Practice Act,

*against*

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE, and JAMES MARSHALL, constituting the Board of Education of the City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

*Respondents,*

18 directing them to discontinue certain school practices,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,

*Intervenor-Respondent.*

---

The petitioners having moved for an order directing the respondent, Francis T. Spaulding, as Commissioner of Education, to rescind and

abrogate the regulations respecting released time established by the Commissioner of Education, as described in the petition annexed to the notice of motion, and to issue an order to respondent, Board of Education, directing the said Board to rescind and abrogate the regulations respecting released time established by it as described in the said petition, and to discontinue the released time program, and further directing the respondent, Board of Education, to discontinue the released time program and abrogate and rescind all regulations established by it authorizing such released time program, and the motion having been "Marked Off" the Calendar pending a determination of a motion by the respondent, Francis T. Spaulding, Commissioner of Education of the State of New York, for a change of venue of this proceeding from Kings County to Albany County; and the Greater New York Coordinating Committee on Released Time of Jews, Protestants, and Roman Catholics having moved for an order permitting it to intervene as an intervenor-respondent herein, and an order having been entered in the office of the Clerk of the County of Kings on or about the 20th day of June, 1949, permitting the Greater New York Coordinating Committee on Released Time of Jews, Protestants, and Roman Catholics to intervene as an intervenor-respondent, and the petitioners having thereafter moved for an order (1) directing a trial in respect of triable issues of fact raised by the pleadings and accompanying papers, (2) the hearing of any objections in point of law in relation to the pleadings, and (3) argument upon the merits of petitioners' application, and the intervenor-respondent having

moved for an order, (1) determining that the intervenor-respondent is entitled to a final order dismissing the proceedings on the merits in that the petition fails to state facts sufficient to constitute a cause of action, and the motions having duly come on before me to be heard,

Now, upon reading and filing the notice of motion of the petitioners, dated July 23, 1948, together with the petition of Tessim Zorach and Esta Gluck, verified on the 23rd day of July,
23 1948, annexed thereto, the answer of the respondent, Board of Education of the City of New York, verified on the 6th day of January, 1950, and the affidavits of William Jansen, C. Frederick Pertsch, Richard M. Lubell, and Anna Mungeer, all sworn to on the 6th day of January, 1950, annexed thereto, the answer of the respondent, Francis T. Spaulding, Commissioner of Education of the State of New York, verified on the 9th day of January, 1950, together with the affidavit of Francis T. Spaulding, sworn to on the 9th day of January, 1950, with exhibits A, B, C and D annexed thereto, the answer of the
24 intervenor-respondent, The Greater New York Coordinating Committee on Released Time of Jews, Protestants, and Roman Catholics, verified on the 24th day of June, 1949, the notice of motion of the petitioners, dated April 6, 1950, together with the affidavit of Kenneth W. Greenawalt, sworn to on the 6th day of April, 1950, annexed thereto, the notice of motion of the intervenor-respondent, dated the 10th day of April, 1950, the reply of the petitioners to the matters set forth in the answers of the intervenor-respondent, verified on the 18th day of April, 1950, and after

hearing Kenneth W. Greenawalt, Esq., attorney for petitioners, in support of the petitioners' motions and in opposition to the motion of the intervenor-respondent; John P. McGrath, Corporation Counsel, Michael A. Castaldi, Assistant Corporation Counsel, of counsel, attorney for the respondent, Board of Education, in opposition to the petitioners' motions; Nathaniel L. Goldstein, Attorney General, attorney for the respondent, Francis T. Spaulding, Commissioner of Education of the State of New York, John P. Powers, Assistant Attorney General, of counsel, in opposition to petitioners' motions; and Charles H. Tuttle, Esq. and Porter R. Chandler, Esq., attorneys for the intervenor-respondent, in opposition to petitioners' motions and in support of the motion of the intervenor-respondent; and due deliberation having been had; upon filing the opinion of the Court, dated the 19th day of June, 1950, it is

ORDERED, that the petitioners' motion for an order directing a trial in respect of triable issues of fact raised by the pleadings and accompanying papers be and the same hereby is in all respects denied; and it is further

ORDERED, that the cross motion of the intervenor-respondent for an order determining that the said intervenor-respondent is entitled to a final order dismissing the proceedings on the merits in that the petition fails to state facts sufficient to constitute a cause of action, be and the same hereby is granted in all respects; and it is further

28 *Final Order Appealed From*

ORDERED, that the objections of the respondents in point of law to the petition be and the same hereby are sustained; and it is further

ORDERED, that the application of the petitioners be and the same hereby is denied in all respects and that the petition be and the same hereby is dismissed on the merits as a matter of law.

Enter

A. J. D.
J. S. C.

29

FRANCIS J. SINNOTT
Clerk

Granted June 23, 1950

FRANCIS J. SINNOTT
Clerk

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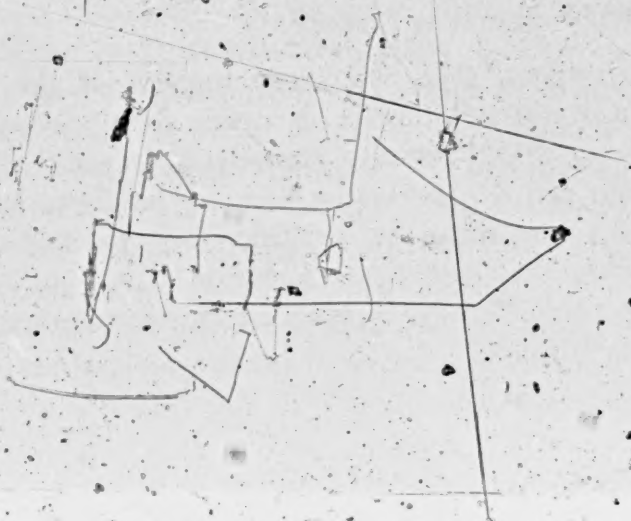

## Notice of Motion of Petitioners Tessim Zorach and Esta Gluck for an Order to Rescind Regulations and Discontinue Program Respecting Released Time

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Tessim Zorach and Esta Gluck, duly verified the 23rd day of July, 1948, the undersigned will move this Court at a Special Term, Part I thereof, to be held in and for the County of Kings at the County Court House, Borough Hall, Brooklyn, New York on the 4th day of August, 1948, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order directed against respondents and commanding respondent Francis T. Spaulding as Commissioner of Education to rescind and abrogate the regulations respecting released time established by the Commissioner of Education as described in the annexed petition and to issue an order to respondent Board of Education directing said Board to rescind and abrogate the regulations respecting released time established by it as described in the said petition, and to discontinue the released time program as aforesaid; and further commanding respondent Board of Education to discontinue the released time program as aforesaid and abrogate and rescind all regulations established by it authorizing such released time program;

*Notice of Motion of Petitioners for an Order to Rescind Regulations and Discontinue Program Respecting Released Time*

and further, granting petitioners such other and further relief as may be just and proper in the premises.

Dated: New York, New York, July 23, 1948.

Yours, etc.,

KENNETH W. GREENAWALT
Attorney for Petitioners
Office & P.O. Address:
1 Wall Street
Borough of Manhattan
City of New York

To:

ANDREW G. CLAUSON, JR.
MAXIMILIAN MOSS
ANTHONY CAMPAGNA
HAROLD C. DEAN
GEORGE A. TIMONE
JAMES MARSHALL
constituting the Board of Education of the City of New York,
110 Livingston Street
Brooklyn 2, New York

HON. FRANCIS T. SPAULDING
Commissioner of Education of the State of New York
The State Education Department
Albany 1, New York

## Petition of Tessim Zorach and Esta Gluck, Read in Support of Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

The petition of Tessim Zorach and Esta Gluck alleges:

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FIRST: Each of the petitioners is a citizen of the United States and a resident of the State and City of New York in the County of Kings, and each is the owner of real property in the said county of Kings, assessed by the taxing authorities in a sum exceeding one thousand dollars ($1,000), and has within one year previous hereto paid taxes upon such assessment.

SECOND: Petitioner, Tessim Zorach, is the father of a child of seven who resides with petitioner, and pursuant to the provisions of the Education Law, attends regularly at Public School No. 8 in the Borough of Brooklyn, City of New York. Petitioner, Esta Gluck, is the mother of two children aged twelve and eight, who reside with petitioner, and pursuant to the provisions of the Education Law, attend regularly at Public School No. 130 in the Borough of Brooklyn, City of New York. Said public schools numbered 8 and 130 are under the jurisdiction and control of respondent Board of Education and subject to the general supervision of respondent Francis T. Spaulding, as Commissioner of Education.

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*Petition of Tessim Zorach and Esta Gluck, Read in Support of Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

THIRD: At all times herein mentioned, respondent Francis T. Spaulding was and still is Commissioner of Education of the State of New York, and as such is the Chief Executive Officer of the state system of education and of the Board of Regents, charged with the enforcement of all general and special laws relating to the educational system of the State and the execution of all educational policies determined upon by the Board of Regents; that, as such Commissioner of Education he is also entrusted with general supervision of all schools and institutions which are subject to the provisions of the Education Law of the State of New York, and is required by said Education Law to advise and guide the school officers of all districts and cities of the State in relation to their duties and the general management of the schools under their control.

FOURTH: Respondents Andrew G. Clauson, Jr., Maximilian Moss, Anthony Campagna, Harold C. Dean, George A. Timone, and James Marshall, constitute the Board of Education of the City of New York, and are charged with performance of any duty imposed under the Education Law or by regulations of the Commissioner of Education authorized by the Education Law.

FIFTH: Section 3212 of the Education Law requires your petitioners to cause their said minor children to attend regularly upon instruction during the entire term the appropriate pub-

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lic schools or classes are in session and that failure or refusal on the part of petitioners to cause their said minor children so to attend renders petitioners subject to punishment pursuant to the provisions of section 3238 of the Education Law.

SIXTH: On information and belief: Purporting to act pursuant to Section 3210 of the Education Law which provides that absence for religious education shall be permitted under rules that the commissioner shall establish, the predecessor in office of respondent Francis T. Spaulding on or about the 4th day of July 1940, established the following regulations, which are still in effect, stated by him to be permissive and not mandatory:

44

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

45

2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools.

SEVENTH: On information and belief: Purporting to act pursuant to said Section 3210 of the Education Law, respondent Board of Education on or about the 13th day of November 1940, established the following regulations:

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card coun-

tersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week except that in classes on a departmental schedule release will be limited to the last period of the program.

5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

6. There shall be no comment by any principal or teacher on the attendance or

52 *Petition of Tessim Zorach and Esta Gluck, Read in Support of Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

non-attendance of any pupil upon religious instruction."

EIGHTH: On information and belief: Regulation 4 of the said regulations was amended by the Respondent Board of Education on September 24, 1941, to read as follows:

"4. Upon the presentation of a proper
53 request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

Said regulations have not otherwise been modified or rescinded and are still in full force and effect.

NINTH: On information and belief: Purporting to act pursuant to the aforesaid statute and regulations, respondent Board of Education has
54 established and is continuing to operate in the public schools of New York City, including said public schools numbered 8 and 130, a system or practice of releasing children for religious instruction, commonly known as the released time system or program.

TENTH: On information and belief: The released time program in New York City is under the supervision of an organization known as the Greater New York Coordinating Committee on Released Time (hereinafter referred to as the Coordinating Committee). The Coordinating

*Petition of Tessim Zorach and Esta Gluck, Read in Support of Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

Committee was formed to promote religious instruction through use of the public school system and cooperates closely with the public school authorities in the management of the program and in promoting religious instruction. 55

ELEVENTH: On information and belief: Said released time program in New York City operates as follows: The Coordinating Committee or church authorities distribute either to parents of public school children at home or in churches or to public school children at or near the public school premises, cards for signatures to indicate the parent's approval to his child's being released for sectarian religious instruction during school hours. Children whose parents sign such cards deliver them to the public school authorities and they in turn deliver lists of the children whose parents so consent to the Coordinating Committee or to the religious centers. These children are released regularly for one hour each week from attendance at public school on condition that they attend during the released hour at the religious center for sectarian religious instruction. Parents who sign such consent cards thereby enter into an agreement with the public school authorities in consideration of their children being released from attendance at regular public schools, that their children will attend and receive sectarian religious instruction at the religious centers. Children whose parents do not sign consent cards are separated from the other children and are re- 56 57

58 quired to continue in attendance at the public school. The children who are released receive sectarian, religious teaching in the faith of the center which they attend. At weekly intervals the religious centers file with the public school system and the Coordinating Committee a list of the children who have been released from public school but have not reported for religious in-
59 struction at the religious center.

TWELFTH: On information and belief: Administration of the system necessarily entails use of the public school machinery and time of public school principals, teachers and administrative staff.

THIRTEENTH: The operation of the compulsory education system of the State of New York as aforesaid assists and is integrated with the program of sectarian religious instruction carried on by separate religious sects and that pupils compelled by law to go to school for
60 secular instruction are released in part from their legal duty upon the condition that they attend the religious classes.

FOURTEENTH: Upon information and belief: The operation of the released time program has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction.

FIFTEENTH: The operation of the released time program as aforesaid is a utilization of the

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State's tax-established and tax-supported public school system to aid religious groups to spread their faith.

SIXTEENTH: The operation of the released time program has resulted and inevitably will result in divisiveness because of difference in religious beliefs and disbeliefs.

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SEVENTEENTH: The limiting of participation in the released time program to "duly constituted religious bodies" effects an unlawful censorship of religion and preference in favor of certain religious sects.

EIGHTEENTH: The operation of the released time program as aforesaid and the regulations established by respondents violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the United States Constitution and made applicable to the States by the Fourteenth Amendment.

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NINETEENTH: The operation of the released time program as aforesaid and the regulations established by respondents prohibit the free exercise of religion in violation of the First and Fourteenth Amendments of the United States Constitution and Section 3 of Article I of the New York Constitution.

TWENTIETH: That if Section 3210 of the Education Law is construed to authorize the establishment of the said regulations and the operation of the released time program as aforesaid, the

64 *Petition of Tessim Zorach and Esta Gluck, Read in Support of Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

said statute violates the First and Fourteenth Amendments of the United States Constitution.

TWENTY-FIRST: On or about the 27th day of June, 1948, your petitioners each duly demanded of respondents that they rescind the aforesaid regulations and discontinue the released time program in the public schools of New York and specifically in public schools numbered 8 and 130,
65. but respondents have failed and refused to do so. The said refusals to rescind the regulations and to discontinue the operation of the released time program were illegal and constitute a dereliction of duty on the part of the respondent Board of Education of the City of New York and of respondent Francis T. Spaulding.

TWENTY-SECOND: Neither of the petitioners nor their children ever sought to take advantage of the released time system herein described, the child of petitioner Zorach receiving regular religious instruction during other than school
66 hours at a Protestant Episcopal religious school, and the children of petitioner Gluck at a Jewish religious school.

TWENTY-THIRD: Rescissions of the aforesaid regulations and discontinuance of the released time program are non-discretionary duties imposed upon respondents by the Constitution of the United States and of the State of New York as aforesaid.

TWENTY-FOURTH: Petitioners have no other

*Petition of Tessim Zorach and Esta Gluck, Read in Support of Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

adequate remedy to procure the redress sought here.

WHEREFORE, your petitioners respectfully pray for an order directed against respondents and commanding respondent Board of Education to discontinue the released time program as described in the petition and abrogate and rescind all regulations established by it authorizing such released time program; and further commanding respondent Commissioner of Education to rescind and abrogate the regulations respecting released time established by the Commissioner of Education and to issue an order to respondent Board of Education directing said Board to rescind and abrogate the regulations respecting released time established by it as described in the petition, and to discontinue the released time program as aforesaid; and further granting petitioners such other and further relief as may be just and proper in the premises.

Dated: New York, New York, July 23, 1948.

TESSIM ZORACH
Petitioner

ESTA GLUCK
Petitioner

LP/CLSA

(Verified, by Petitioners on July 23, 1948)

70 **Answer of Respondent, the Board of Education of the City of New York, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time**

SUPREME COURT OF THE STATE OF NEW YORK

County of Kings

[Same Title]

Respondent, the Board of Education of the
71 City of New York, by John P. McGrath, Corporation Counsel, for its answer to the petition herein:

1. Denies any knowledge or information thereof sufficient to form a belief with respect to each and every allegation contained in paragraph "First" of the petition, except admits that each of the petitioners is a resident of the State and City of New York, in the County of Kings.

2. Denies each and every allegation contained in paragraph "Fifth" thereof, except refers to
72 Education Law §§3212 and 3228 for the text and legal effect thereof.

3. Admits each and every allegation contained in paragraph "Seventh" thereof and further alleges that the Board of Education of the City of New York established its regulations in accordance with the regulations of the Commissioner of Education.

4. Denies each and every allegation contained in paragraphs "Ninth," "Tenth" and "Eleventh," thereof, except as admitted in the affidavits hereto annexed, of William Jansen, C.

*Answer of Respondent, the Board of Education of the City of New York, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

Frederick Pertsch, Richard M. Lubell, and Anna Mungeer, each sworn to the 6th day of January, 1950.

5. Denies each and every allegation contained in paragraphs "Twelfth," "Thirteenth," "Fourteenth," "Fifteenth," "Sixteenth," "Seventeenth," "Eighteenth," "Nineteenth" and "Twentieth" thereof.

6. Denies each and every allegation contained in paragraph "Twenty-first" thereof, except admits that on or about June 27, 1948, petitioners demanded of respondent Board of Education of the City of New York that it rescind its regulations and discontinue the "Released Time Program" in the public schools of New York and specifically in the Public Schools Nos. 8 and 130; and further admits that respondent Board of Education has refused to do so.

7. Denies any knowledge or information thereof sufficient to form a belief with respect to so much of paragraph "Twenty-second" thereof as alleges that the child of petitioner Zorach receives religious instruction during other than school hours at a Protestant Episcopal religious school, and the children of petitioner Gluck at a Jewish religious school.

8. Denies each and every allegation contained in paragraphs "Twenty-third" and "Twenty-fourth" thereof.

76 *Answer of Respondent, the Board of Education of the City of New York, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time . . .*

As and for a separate and complete defense thereto, respondent Board of Education of the City of New York alleges:

9. The petition fails to state facts sufficient to constitute a cause of action against the Board of Education of the City of New York.

77 Wherefore, respondent, The Board of Education of the City of New York, demands that the application of the petitioners be denied in all respects and that the petition be dismissed with costs.

John P. McGrath,
Corporation Counsel,
Attorney for Respondent, The Board of Education of the City of New York,
Office and P. O. Address:
Municipal Building,
Borough of Mannattan,
78 City of New York.

(Verified by Morris Warschauer, Assistant Secretary of Board of Education, on January 6, 1950.)

**Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time** 79

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

State of New York }
County of Kings } ss.:

WILLIAM JANSEN, being duly sworn, deposes 80
and says:

1. Since September 1, 1947, I have been the Superintendent of Schools of the City of New York. For a number of years prior thereto I was an Assistant Superintendent of Schools.

2. I am fully familiar with both the history and the manner in which the "released time program" operates in the City of New York.

The released time program for religious education was begun in New York City in February, 1941, following the enactment by the Legislature 81
of Chapter 305 of the Laws of 1940, which amended Education Law Section 625 (now Education Law §3210 by adding thereto the following sentence:

> "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

In approving and signing the bill (Laws of 1940, Chap. 305) Governor Lehman said:

> "Under this bill the State Commissioner of Education shall establish rules

82 *Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education.

"For some time it has been the practice in many localities in the State to excuse children from school a certain
83 period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: 'Neither the Constitution or the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.'

"However, at the present time there
84 is no uniformity of practice throughout the State. Nor is any officer or agency of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules.

"A few people have given voice to fears that the bill violates principles of our

*Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time.*

Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

In pursuance of such legislative authorization the State Commissioner of Education, on July 4, 1940, issued the following regulations which are still in force and effect:

"1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close

88 *Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

89 On November 13, 1940, the Board of Education of the City of New York promulgated the following rules and regulations to govern the operation of the released time program in New York City.

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

90 "2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a

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record of pupils entitled to be excused, and will not be available or used for any other purpose.

"3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

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"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week, except that in classes on a departmental schedule release will be limited to the last period of the program.

"5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

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"6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

The foregoing rules have been continued in effect without change except Rule No. 4 which

94 *Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

was amended by the Board of Education on September 24, 1941 to read as follows:

> "4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different
95 day may be designated for each borough."

Pursuant to such Rule 4, as amended, I have prescribed the following schedule for released time instruction at 2.00 p.m. on the day of the week indicated for each of the several boroughs in the City of New York as follows:

| | |
|---|---|
| Bronx | —Tuesday |
| Brooklyn | —Wednesday |
| Queens | —Wednesday |
| Richmond | —Wednesday |
| Manhattan | —Thursday |

96 These rules and regulations, together with other matters involving school administration, are sent by my office, from time to time, to all principals and other school officials concerned.

In compliance with the Education Law, the rules of the State Commissioner of Education, and the rules of the Board of Education of the City of New York, the "released time program" operates in New York City in the following manner:

The parent who desires to have his child

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released for religious instruction signs a card in the form substantially as follows:

"Registration for Released Time
Religious Instruction

New York City.....194.....

To....., Principal of.....School

Please excuse my child, of grade..... 98

one hour weekly on.....throughout the rest of this school year, beginning .....to go for religious instruction at

.....

(Name of Center to which child is to go)

(a) .....

(Signature of parent or guardian)

Address .....Phone .....

(b) Provision has been made to accommodate and instruct this pupil. 99

.....

(Signature of Clergyman)

(Card to be retained and filed by the Public School)

RS-1"

Such registration cards are prepared and distributed either by "The Greater New York Coordinating Committee on Released Time", a committee wholly independent of our city schools, or by the particular religious organization con-

100 *Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

ducting the religious instruction. Neither the Board of Education nor its school principals, teachers or other employees participate in any way in the distribution of such cards. Furthermore, the distribution of the cards is not permitted within the public schools. The preparation or printing of the cards involves no expense on the part of the Board of Education of the
101 City of New York. When the card is received by the principal of the school, the principal notifies the teacher of the class wherein the pupil named in the card is enrolled, that such pupil is to be released at 2:00 p.m. on the day designated for religious instruction in that borough. At the appointed time—2:00 p.m.—without further announcement by the teacher in the classroom the child leaves the class and the school grounds and proceeds for religious instruction to the location specified by the religious organization. The dismissal of those pupils who participate in the released time program is effected in
102 the same manner as the normal dismissal of pupils at the close of the school day.

The rules of the Board of Education provide that the religious organization is to notify the school principal each week of the attendance or absence of pupils upon religious instruction. In the event that a pupil is absent from religious instruction three times, the religious organization requires the parent to revoke the permission for the release of such pupil. Thus, the responsibility for the pupils' attendance upon their religious instruction is assumed solely by the

religious organizations in cooperation with the parents. 103

The registration cards are not available or used by the school authorities for any purpose other than as a record of pupils entitled to be excused.

3. In summary the chief characteristics of the "released time program" in New York City are as follows: 104

(a) The religious instruction is given outside the school buildings and grounds.

(b) The released time program is entirely permissive and voluntary. The pupil is excused for religious instruction only upon the joint written request of his parent or guardian and the particular religious organization.

(c) The absence of the pupil is limited to one hour a week, such hour to be the last hour of the school session. All the pupils of all religious faiths participating in the released time program are excused at the same time on the same day in the particular borough. 105

(d) The released time program is open to any religious organization, in cooperation with the parents of the pupils concerned, who desire to participate therein.

(e) The religious organization, in cooperation with the parents, assume full responsibility for attendance at the religious center and for the program of religious instruction thereat.

106 (f) The released pupils are dismissed from school in the usual way as in the case of other permitted absences.

(g) The school authorities have no responsibility beyond that assumed in regular dismissals.

(h) The parent's written request for the excuse of the child is filed with the school and is
107 not available or used for any other purpose.

(i) The religious organization files with the school principal a card attendance record for each pupil excused from the school pursuant to the parent's request.

(j) There is no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction.

(k) The planning necessary to accommodate pupils on released time is no greater than or different from that required when large numbers of
108 pupils are absent in the schools of the City of New York for the purpose of observing religious holidays or by reason of inclement weather or serious illness in any particular community.

(l) The operation of the released time program entails no expenditure of public moneys.

The "released time program" operating in New York City is vastly different from the Champaign plan which was declared by the United States Supreme Court to be unconstitutional in the *McCollum* case. Set forth below in

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parallel columns are the essential differences between the Champaign Plan and the New York City Plan:

| Champaign Plan | New York City Plan |
|---|---|
| No underlying enabling State statute. | 1. Education Law §3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish". |
| Religious training took place in the school buildings and on school property. | 2. Religious training takes place outside of the school buildings and off school property. |
| The place for instruction was designated by school officials. | 3. The place for instruction is designated by the religious organization in cooperation with the parent. |
| Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils. | 4. No element of segregation is present. |

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112 *Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

| Champaign Plan | New York City Plan |
|---|---|
| 5. School officials supervised and approved the religious teacher. | 5. No supervision or approval of religious teachers or course of instruction by school officials. |
| 6. Pupils were solicited in school buildings for religious instruction. | 6. School officials do not solicit or recruit pupils for religious instruction. |
| 113 | |
| 7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds. | 7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved. |
| 8. Non-attending pupils isolated or removed to another room. | 8. Non-attending pupils stay in their regular classrooms continuing significant educational work. |
| 114 | 9. No credit given for attendance at the religious classes. |
| | 10. No compulsion by school authorities with respect to attendance or truancy. |
| | 11. No promotion or publicizing of the released time program by school officials. |
| | 12. No public moneys are used. |

*Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

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The view is widely shared among educators that since religion has to do with the highest values and aspirations of man it must play an essential role in education. From the mental hygiene point of view, it is important that children grow up in the security of those basic spiritual values which are woven into their cultural heritage. A sound religious education helps the individual to withstand conflicting 116
stresses within the personality, to develop self-respect and true humility, to define values, to accept goals beyond immediate personal satisfaction, to make sacrifices for the general good, and to be truly tolerant of other races and religions. All of these qualities are essential to a well integrated personality.

While it is not the function of the public school to give religious education, the educator and the citizens of the community at large are aware that religious education is a factor in the development of the child's total personality.

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In the administration of our public schools the Board of Education recognizes that such schools are non-sectarian and the instruction therein is confined to the secular. However, we also recognize the right inherent in a parent to direct the training and nurture of his child and that the child is not the mere creature of the state. The "released time program" as operated in the City of New York does nothing more and nothing less than to recognize such fundamental rights and principles. The secular instruction and the religious instruction are kept

118 *Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

within their respective spheres. The principle of separation of church and state is thus kept inviolate.

In the operation of the "released time and program" in New York City, the school authorities scrupulously observe the principle of separation of Church and State. The very manner in which the "released time program" is operated
119 in the City of New York precludes any violation of constitutional principles.

I am advised that any factual allegations in the petition concerning alleged defects in the operation of the released time program in two particular schools cannot affect or be determinative of the legality and constitutionality of the released time statute and regulations promulgated thereunder. Nevertheless, I have requested the principals of P.S. 8 and P.S. 130, Brooklyn, the schools in which the petitioners' children attend, to set forth the facts as to how the released time program operates in their particular school. I
120 have read the annexed affidavits of Richard M. Lubell and Anna Mungeer, each sworn to January 6, 1950 and accordingly state that the released time program in those schools is functioning within the letter and spirit of the rules and regulations of the Board of Education.

WHEREFORE deponent prays that the petitioners' application be denied.

WILLIAM JANSEN

(Sworn to January 6, 1950.)

**Affidavit of C. Frederick Pertsch, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time** 121

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

State of New York }
County of Kings } ss.:

C. FREDERICK PERTSCH, being duly sworn, deposes and says: 122

1. I am an Associate Superintendent of Schools of the City of New York.

2. I am familiar with the various provisions of the "compulsory education law" and the manner in which such provisions are administered by the Board of Education of the City of New York. The pertinent provisions are as follows:

Education Law, §3204, subd. 1, provides that "a minor required to attend upon instruction * * * may attend at a public school or elsewhere." 123

Education Law, §3204, subd. 3, provides that the course of study for the first eight year of secular instruction shall encompass certain specified subjects.

With respect to the "length of school sessions," Education Law, §3204, subd. 4, reads as follows:

"4. Length of school sessions. a. A full time day school or class, except as

124 *Affidavit of C. Frederick Pertsch, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

> otherwise prescribed, shall be in session for not less than one hundred ninety days each year, inclusive of legal holidays that occur during the term of said school and exclusive of Saturdays."

It may be noted that in the public schools of New York City the length of school sessions comprises about 190 days each year exclusive of
125 legal holidays and Saturdays.

Education Law, §13205, subd. 1, provides that each minor from seven to sixteen years of age shall attend upon "full time day instruction." The statute, however, does not define the term "full time day instruction." This is covered in the By-Laws of the Board of Education which provide that "full time instruction" for classes above the first year grades shall consist of "two sessions aggregating five hours daily."

The By-Laws further provide that a class not receiving "full time instruction" shall be con-
126 sidered as receiving "short time instruction."

Such provisions of the By-Laws of the Board of Education relating to "full time instruction" and "short time instruction" are contained in §77, subd. 2 thereof which reads as follows:

> "Class sessions shall be divided into full time and short time. Full time instruction shall be defined as follows: Four hours of instruction daily, consisting of 2 sessions separated by an interval of at least 1 hour for lunch, shall be considered full time for classes of the first year grades. Full

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time in classes above the first year grades shall consist of 2 sessions aggregating 5 hours daily, separated by an interval of at least 1 hour for lunch, excepting that in hospital classes and classes for crippled children, 2 sessions aggregating 4½ hours daily, separated by an interval of at least 1 hour for lunch, shall be considered full time. When necessary, the interval for 128
lunch herein provided may be shortened to not less than 30 minutes with the approval of the Superintendent of Schools, or it may be omitted in the case of classes of the first year grades with the like approval.

A full time class receiving all its instruction between 8:30 a.m. and 3:30 p.m. shall be classified as full time, regular schedule. A full time class receiving part of its instruction either before 8:30 a.m. or after 3:30 p.m. shall be classified as full time, 129
special schedule.

A class not receiving full time instruction as hereinbefore defined shall be considered as receiving short time instruction. Permission to place classes on full time, special schedule, or short time shall be subject to the approval of the Superintendent of Schools."

By reason of special circumstances existing in some of our school areas, it is necessary to have "double sessions" on each school day.

130 *Affidavit of C. Frederick Pertsch, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

Each session covers four hours. Such "double sessions" are held, for example, in schools where we are confronted with the problem of "overcrowding" occasioned, unfortunately, by presently inadequate school facilities. Nevertheless, such "double sessions" are recognized by the Commissioner of Education as being in compliance with the Compulsory Education Law and
131 there is no lessening of "State Aid" thereby.

As to absence from required attendance, Education Law §3210, subd. b, provides as follows:

> "b. Absence for religious observance and education shall be permitted under rules that the Commissioner shall establish."

Education Law, §3210, subd. 3d, provides that a minor who is required to attend upon full time day instruction "may be permitted to attend for a shorter school day or for a shorter school year or for both, provided, in accordance with
132 the regulations of the State Education Department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that prescribed by the "compulsory education law."

In conformity with the rules established by the Commissioner of Education, the Board of Education has promulgated regulations which permit of absence for religious instruction to the extent of one hour on one day of each week.

*Affidavit of C. Frederick Pertsch, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

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3. The instructional machinery of our city schools is so geared as to comply in all respects with the provisions of the "compulsory education law." Such compliance is unaffected by the excused absence of pupils for one hour per week for the purpose of attending upon religious instruction. Those pupils who remain in school when others are released for religious instruction are given significant education work with 134 emphasis on individual and remedial instruction. The pupils who are released are given comparable instruction, as the opportunity may present itself, at other times during the school week. In any event, the requirements of the "compulsory education law" are fully observed and administered alike to all pupils both as to "required attendance" and as to imparting instruction in the subjects mandated by Education Law, §3204, subd. 3.

C. Frederick Pertsch

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(Sworn to January 6, 1950.)

136 **Affidavit of Richard M. Lubell, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

State of New York }
County of Kings } ss.:

137 RICHARD M. LUBELL, being duly sworn, deposes and says:

I am the Principal of P.S. 130, Brooklyn, 70 Ocean Parkway, Brooklyn, New York, and have been the Principal since February, 1946.

Margie Gluck, one of the children of the petitioner Esta Gluck, is a pupil in my school in the fourth grade.

I am fully familiar with the manner in which children are released from this school for religious instruction and am fully familiar with all the rules, regulations and directives issued
138 by the Board of Education concerning the release of children for religious instruction.

I have read the affidavit of William Jansen, Superintendent of Schools, sworn to January 6, 1950, and in so far as that affidavit sets forth the manner in which children are released from the public schools for the purpose of religious instruction I subscribe to the statements therein contained. The manner in which children are released in P.S. 130, Brooklyn, is in all respects consistent with the statements contained in that affidavit, except that in my school a bell is rung

*Affidavit of Richard M. Lubell, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

at 1:55 P.M. on each Wednesday (the time set for released time in Brooklyn) and at that time the teachers advise the children that those who have been excused may leave. No further comment is made.

Release of children for religious instruction on Wednesday afternoon is a matter of routine. Children who remain in school are given remedial and individual instruction on matters which they need. No new work is taken up during this last hour. All children, released and not released meet all requirements of the course of study. Any individual or remedial instruction that is needed by the children who go out on released time is given them by their teacher at some other time during the school week.

I have received no complaint or protest by any student or parent, including the petitioner Gluck in this case, concerning the released time practiced in my school.

RICHARD M. LUBELL

(Sworn to January 6, 1950.)

142 **Affidavit of Anna Mungeer, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time.**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

State of New York
County of New York } ss.:

143 ANNA MUNGEER, being duly sworn, deposes and says:

I am a teacher assigned by the Board of Education during the absence of the Junior Principal to be the Acting Junior Principal of Public School 8, Brooklyn, located at 37 Hicks Street, Brooklyn, New York. From September, 1942 to date, I have been a teacher of the 8th grade in P.S. 8 and in charge of released time in my school.

Peter and Timothy Zorach, the children of the petitioner Tessim Zorach, are pupils in this
144 school in the second and fourth grades, respectively.

I am fully familiar with the manner in which children are released from this school for religious instruction and am fully familiar with all the rules, regulations and directives issued by the Board of Education concerning the release of children for religious instruction.

I have read the affidavit of William Jansen, Superintendent of Schools sworn to the 6th day of January, 1950. The manner in which the children participating in the Released Time Pro-

*Affidavit of Anna Mungeer, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

gram are released in P.S. 8 is completely in compliance with the Released Time Regulations of the Board of Education as set forth in the affidavit of Mr. Jansen, except that in my school a bell is rung at 1:55 P.M. on each Wednesday (the day set for released time in Brooklyn) and at that time the teachers merely announce that the children who have been excused may leave. No further comment is made. In this respect, the children are released in the same manner as in a normal dismissal at the close of the school day.

Release of children for religious instruction on Wednesday afternoon is taken as a matter of course by the other children who remain. Such children are given remedial and individual instruction on matters which they need. No new work is taken up during this last period and there is no interference with the teaching of required subjects. Any individual or remedial instruction that is needed by the children who go out on released time is given them by their teacher at some other time during the school week.

I have received no complaint, protest or criticism of any kind from any student or parent, nor from the petitioner Tessim Zorach or his two children, Peter and Timothy, concerning the released time practice in the school.

ANNA E. MUNGEER

(Sworn to January 6, 1950.)

148 **Answer of Respondent the Commissioner of Education of the State of New York, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time**

SUPREME COURT OF THE STATE OF NEW YORK

County of Kings

[Same Title]

149 The respondent Francis T. Spaulding, Commissioner of Education of the State of New York, as and for his answer to the petition herein:

First: On information and belief, denies each and every allegation contained in paragraphs Ninth, Tenth and Eleventh thereof, except that he admits that a released time program is being carried on in the public schools of the City of New York and alleges that the said program is in all respects in accordance with the law, rules and regulations applicable thereto.

150 Second: Denies each and every allegation contained in paragraphs Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-Third and Twenty-Fourth thereof.

Third: Denies the allegations contained in paragraph Twenty-First thereof insofar as it is therein alleged that any action or failure to act on the part of this respondent was or is illegal and constituted or constitutes a dereliction of duty.

*Answer of Respondent, Commissioner of Education of the State of New York, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time* 151

OBJECTIONS IN POINT OF LAW

The respondent above named hereby objects in point of law to the petition upon the following ground:

1. The petition fails to state facts sufficient to constitute a cause of action against the respondent Commissioner of Education. 152

WHEREFORE, respondent Francis T. Spaulding, Commissioner of Education of the State of New York, requests that the petition be dismissed, with costs.

NATHANIEL L. GOLDSTEIN
Attorney General of the State of New York
Attorney for Respondent Francis T. Spaulding, Commissioner of Education of the State of New York

The Capitol 153
Albany, New York

To:

KENNETH W. GREENAWALT, Esq.
Attorney for Petitioners
1 Wall St.
Borough of Manhattan
New York 5, New York

154 *Answer of Respondent, Commissioner of Education of the State of New York, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

Hon. John P. McGrath
Corporation Counsel of the City of New York
Attorney for Respondent Board of Education of the City of New York
Municipal Building
New York 7, New York

Charles H. Tuttle, Esq.
155 Attorney for Intervenor-Respondent
15 Broad St.
New York 5, New York

(Verified by Francis T. Spaulding, Commissioner of Education of State of New York, on January 9, 1950.)

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## Affidavit of Francis T. Spaulding, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

FRANCIS T. SPAULDING, being duly sworn, deposes and says:

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1. That I am the Commissioner of Education of the State of New York, and one of the respondents named in the above-entitled proceeding.

2. That in accordance with the authority contained in Education Law, §§207 and 3210, subd. 1b, one of my predecessors in office promulgated the regulation quoted in full in paragraph SIXTH of the petition herein; that the regulation was duly approved by the Board of Regents of the University of the State of New York and filed in the office of the Department of State, and thereupon became and remains effective (N. Y. Const. Art. IV, §8; Executive Law, §36; State of New York, Official Compilation of Codes, Rules and Regulations, Vol. 1, p. 683).

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3. That the Department of Education of the State of New York exercises general supervision over the practices of local boards of education and other local public school authorities in the matter of enforcing compliance with the provisions of the Education Law of the State of New York, including those providing for compulsory attendance (Education Law, Art. 65, Part 1, §§3201-3229); that the hours during which at-

160 *Affidavit of Francis T. Spaulding, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

tendance is required, the granting of individual excuses therefrom and the determination of the sufficiency of the reasons therefor are all matters generally within the province of local school authorities, with which the Department is not primarily concerned except in an advisory or supervisory capacity.

161 4. That in such capacity, the Department has prepared and distributed bulletins containing digests of the applicable statutory provisions, regulations promulgated thereunder, rules of procedure and forms for the information, assistance and guidance of local school authorities in such matters; that in the matter of the recognition of *bona fide* excuses which may be accepted as proper, warranting absence from attendance upon instruction in all schools, the Department has advised local school authorities that the following are among those that may be so accepted (Bulletin No. 1248, University of the State of
162 New York July 1, 1943, pp. 30-32):

Sickness of the pupil
Sickness or death in the family
Impassable roads or weather making travel unsafe
Religious observance
Quarantine
Required to be in court
Religious instruction or education (Regulation of Commissioner of Education, §154)
Approved instruction in music

*Affidavit of Francis T. Spaulding, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

163

5. That the matter of instituting so-called released time programs, or excusing pupils from attendance upon instruction in the public schools at the request of their parents or guardians for the purpose of attending religious meetings or classes, in accordance with the requirements of the aforesaid regulation of the Commissioner of Education (Reg., §154), is solely within the province of the local school authorities; that the 164
Department is without information disclosing the number, extent or types of such programs in practice throughout the State.

6. That absence for one hour or less per week for such purposes, in accordance with the requirements of Regulation §154, is excused in many localities; that attached hereto as Exhibits A through D are letters addressed to Counsel for the Department of Education from local school authorities selected at random throughout the State, containing descriptive summaries of such practices prevailing in those particular localities, 165
which practices are believed to be representative of those generally prevailing throughout the State.

/s/ FRANCIS T. SPAULDING

(Sworn to January 9, 1950.)

166 **Exhibit A, Annexed to Affidavit of Francis T. Spaulding**

Copy

THIRD SUPERVISORY DISTRICT

ALBANY COUNTY SCHOOLS

HAROLD P. FRENCH
District Superintendent
TOWN HALL
Newtonville, New York

May 13th, 1948

167 Dr. Charles Brind
State Education Department
Albany 1, New York

Dear Dr. Brind:

Schools in this supervisory district follow slightly different procedures in arranging for released time for religious education. In most cases they follow along the two patterns which I am describing below.

At Menands (Colonie 15), pupils from all denominations and of all grades are excused for the last hour of the school day each Tuesday
168 afternoon. The rest of the pupils remain in the classroom and receive instruction from the regular classroom teacher. This instruction is intended to review or enrich the lives of pupils, but no new problems are presented at this time.

Pupils are released following a written request from the parents. These requests are made on a blank which is furnished by the local Federation of Churches. Pupils are permitted to go to the church of their choice for instruction. The same blanks are used even though certain of the churches are not members of the Federation.

*Exhibit A, Annexed to Affidavit of Francis T. Spaulding*

The church authorities are responsible for the pupils after they leave the school building. In the rare cases where pupils are not in attendance, the church authorities contact the school principal and notify her of the absence. They also contact the parents and attendance problems are handled by church and home cooperatively. Thus far, this school has never found it necessary to use any pressure. I imagine, however, that if reports continued that a child was absent without cause, the release of the pupil would be revoked and the child would be retained in the school for the hour.

In West Albany (Colonie 19), pupils are released in three different groups according to grade level. One group is released for the last hour on Monday, another for Tuesday, and the third for Wednesday. But one church organization utilizes this privilege and this church furnishes printed cards on which parents request that pupils be released. In other respects, conditions are similar to the conditions in Menands. Pupils who do not attend regularly are, after consultation with the home, refused the privilege of released time.

I trust that these two examples will furnish information which may be of value.

Cordially yours,

HPF/mbh

(sgd.) H. P. FRENCH

172 **Exhibit B, Annexed to Affidavit of Francis T. Spaulding**

COPY

CITY OF ALBANY, N. Y.
BOARD OF EDUCATION

Commissioners
Neile F. Towner, President
Frank S. Harris
Dr. Frederic C. Conway

Superintendent of Schools
John W. Park
173 Business Manager
John R. Quinn

May 14, 1948

Mr. John W. Park
Superintendent of Schools
Albany, N. Y.

Dear Mr. Park:

The practice of granting released time to Public School children for the purpose of attending religious education has been maintained in the Albany schools for a good many years. Three
174 or four years ago a pattern was set up in which all children desiring religious education left the schools on a given day of each week. This new pattern was arrived at by agreement among the representatives of the three major faiths and the Superintendent of Schools and the program since has been satisfactory to both the schools of religious education and the Public Schools.

The Albany Public Schools provide for released time for religious education in conformance with the Rules of the Commissioner of

*Exhibit B, Annexed to Affidavit of Francis T. Spaulding*

Education as provided in Section 3210 of Article 65 of the Education Law.

Our practice is as follows:

Upon request in writing by the parent or guardian a pupil is excused from school during school hours for religious education to be conducted outside the school building and grounds.

Such absence is for one hour at the close of the session on one day of the week.

For the schools in the northern half of the city the day for released time is Wednesday and for the southern half it is Tuesday.

The courses in religious education have been or are currently being maintained and operated by duly constituted religious bodies as follows: Protestant, Catholic, Jewish.

Pupils are registered for the religious education courses by the religious authorities, and a copy of the registration is filed with the school principal.

A record for each child is also maintained in the keeping of the register.

Reports of attendance of pupils upon these courses are filed with the principal each week.

In the event of a child being illegally absent from these courses, notification is sent to the parent by the school principal.

The attitude of the public school personnel is to neither further nor detract or in any way influence an opinion on the attendance in or value of the religious education courses.

The above practices seem to be satisfactory to the religious authorities in the City of Albany.

178 *Exhibit B, Annexed to Affidavit of Francis T. Spaulding*

It also appears to have widespread popularity since in accordance with the above, children from twenty-five out of twenty-eight schools are being granted released time for religious education. Two of the other three are secondary schools in which the dismissal is early enough for the children to participate without being excused.

Respectfully yours,

179 (Sgd) DAVID BRAY
David Bray, Chief
Bureau of Child Accounting,
Enforcement and Census.

DB/bhr

180

**Exhibit C, Annexed to Affidavit of Francis T. Spaulding** 181

COPY

OFFICE OF THE SUPERINTENDENT OF SCHOOLS
Rensselaer, New York

Kenneth H. MacFarland

May 13, 1948

Dr. Charles Brind
Counsel and Assistant Commissioner
State Education Department
Albany 1, New York 182

Dear Dr. Brind:

In response to your inquiry concerning the practices followed in the Rensselaer public school system with respect to the released time for religious instruction program, the procedure is:

(1) All churches participating in the program present written requests to the Board of Education for the early dismissal of the pupils concerned. All churches in the city have agreed upon Wednesday as the day of the week and 2:00 P.M. as the hour of such dismissal. 183

(2) The churches prepare printed permission forms which are supplied by them to the school pupils attending each particular church. These applications must be signed by the parents and presented to the school for approval. They are kept on file in the school.

184 *Exhibit C, Annexed to Affidavit of Francis T. Spaulding*

(3) The churches notify the particular school of the absence of pupils at the religious instruction period.

The principal of the school investigates such absence by determining, first, if the pupil were absent from school on that day. And if not, the pupil is interviewed to find out why he did not attend the religious instruction for which he was dismissed early.

185 If such absences from religious instruction continue over a period of weeks and the pupil is not absent from school, then both the church and the parents are notified that permission for early dismissal for such pupil has been revoked. No punishment is given the pupil who habitually remains away from religious instruction for which his request for early dismissal has been approved, other than the revocation of such permission.

186 I believe this outline covers completely our procedure on released time.

Very truly yours,

(Sgd.) KENNETH H. MACFARLAND
Kenneth H. MacFarland

**Exhibit D, Annexed to Affidavit of Francis T. Spaulding** 187

COPY

DEPARTMENT OF EDUCATION
Watertown, New York

C. E. Sabin
Superintendent of Schools

May 18, 1948

Dr. Charles A. Brind, Jr.
Division of Law
The State Education Department
Albany, New York 188

Dear Dr. Brind:

I submit the following information relative to the excusing of children for religious education in the Watertown schools:

The Board of Education does not furnish buildings, supplies or teachers for the conducting of this instruction.

Children in the kindergartens and the first six grades are excused Wednesday afternoons at three o'clock upon the written request of parents made on forms supplied by the churches where the instruction is given. 189

Attendance records are kept by the teachers of the religious instruction and children tardy or absent are reported to the public schools where they attend. Attendance blanks and all other supplies are furnished by the churches involved.

The City of Watertown assumes no expense of any nature whatsoever for this instruction.

Very truly yours

(Sgd.) C. E. SABIN
Superintendent of Schools

190 **Answer of The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time**

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

191 [SAME TITLE]

The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, intervenor-respondent, for its answer to the petition of petitioners Tessim Zorach and Esta Glück:

1. Denies each and every allegation of Paragraph Sixth, except that it admits that pursuant to Section 3210 of the Education Law, the State Commissioner of Education on July 4, 1940 duly established the regulations set forth in said
192 Paragraph Sixth, which are still in effect and are permissive and not mandatory.

2. Denies each and every allegation of Paragraphs Seventh and Eighth, except that it admits that on November 13, 1940 the Board of Education of the City of New York, for the purpose of effectuating in New York City the statutory authorization of released time established by Chapter 305 of the Laws of 1940 (Education Law Section 3210) and the rules established thereunder by the State Commissioner of Education, issued the rules set forth in said Paragraph Seventh, and thereafter on September 24, 1941

*Answer of The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

193

issued the amendment set forth in said Paragraph Eighth, and except that it admits that said regulations have not otherwise been modified or rescinded and are still in full force and effect.

3. Denies each and every allegation of Paragraphs Ninth through Twentieth, both inclusive, except that it admits that the released time program authorized by the 1940 legislation and the rules established by the Commissioner of Education of the State of New York and the Board of Education of New York City has at all times since been carried on in New York City in strict accordance with said statutes and regulations.

194

4. Denies each and every allegation of Paragraphs Twenty-first, Twenty-third and Twenty-fourth, except that it admits that petitioners Tessim Zorach and Esta Gluck demanded of respondents that they rescind their regulations with respect to the program of released time religious education, and that respondents have declined to do so.

195

FOR A FIRST SEPARATE DEFENSE:

5. The right to the free exercise and enjoyment of religious profession and worship and the right of parents to direct the training of their children and to have them instructed in religion and protected according to the convictions and conscience of such parents against governmental systems or implications which are, or are believed by such parents to be, contrary to or dis-

196 paraging or depreciating of religion or religious belief, are guaranteed by the Constitution of the United States and by the Constitution established by "The People of the State of New York, grateful to Almighty God for our Freedom". (New York Constitution. Preamble.) The State of
197 New York, in furtherance of the public welfare and in recognition of constitutional rights to freedom of religious belief and practice, has the constitutional power to enact laws and adopt rules which, in the reasonable judgment of the legislature and competent public authorities, are appropriate for such purposes.

6. Petitioners Tessim Zorach and Esta Gluck have no lawful authority to interfere with those rights, or to direct the training or education of the children of others, or to prevent under color of judicial process or otherwise, parents who
198 desire religious education for their children from causing such education to be given under the voluntary program set forth in the statute and regulations above mentioned.

7. The interference with freedom of religion and with the right of parents to direct the training of their children, sought to be established by petitioners herein, would be in violation of the Constitutions of the United States and of the State of New York.

FOR A SECOND SEPARATE DEFENSE:

8. The matter is *res judicata*, in that all of

*Answer of The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

199

the questions presented have been determined adversely to the petitioners, in a proceeding heretofore brought by one Joseph Lewis, president of the so-called Free Thinkers of America, on his own behalf and on behalf of all citizens and taxpayers of the state against the State Commissioner of Education seeking the same relief as petitioners now seek. That proceeding is fully and truly reported in *People ex rel. Lewis v. Graves, Commissioner of Education of the State of New York*, 27 Misc. 135; aff'd. 219 App. Div. 233; aff'd. 245 N. Y. 195; reargument denied 245 N. Y. 620. This intervenor-respondent refers to the Record on Appeal therein with the same force and effect as if it were hereto annexed.

200

FOR A THIRD SEPARATE DEFENSE:

9. The matter is *res judicata*, in that all of the questions presented have been determined adversely to the petitioners in a second proceeding heretofore brought by the same Joseph Lewis, president of the so-called Free Thinkers of America, on his own behalf and on behalf of all citizens and taxpayers of the State, against the present respondents seeking the same relief as petitioners now seek (*In the Matter of the Application of Joseph Lewis, petitioner, for an order against Francis T. Spaulding, Commissioner of Education of the State of New York and the Board of Education of the City of New York, respondents, the Greater New York Co-*

201

*ordinating Committee on Released Time of Jews, Protestants, and Roman Catholics, intervenor-respondent*, hereinafter referred to as the *Second Lewis case*.) This Committee was, by order of the court therein, a party intervenor-respondent in that proceeding.

10. The *Second Lewis case* was commenced in the Supreme Court, New York County, in April 1948, and was thereafter transferred to Albany County. At the time when the petitioners Tessim Zorach and Esta Gluck commenced the present proceeding in August 1948, the *Second Lewis case* was pending undecided before Mr. Justice Elsworth in the Supreme Court, Albany County. On information and belief, the petitioners Tessim Zorach and Esta Gluck at and after the time when they commenced the present proceeding were advised and fully aware of the pendency of the *Second Lewis case* and of the issues therein, and that it sought an adjudication on the same grounds as they have assigned in this proceeding for claiming that the New York Statute and Program for Released Time were unconstitutional; and they were invited to participate therein or to have their proceeding consolidated or heard therewith, but they declined to do so.

11. In November 1948 Mr. Justice Elsworth handed down a decision sustaining the constitutionality of the New York Released Time Program and directing the dismissal of the petition in the *Second Lewis case* (193 Misc. 66). A

judgment was duly entered thereon, and petitioner Joseph Lewis thereafter duly appealed to the Court of Appeals from said judgment pursuant to section 588, subd. 4 of C.P.A. On information and belief, the petitioners Tessim Zorach and Esta Gluck were advised of the pendency of the appeal to the Court of Appeals in the *Second Lewis case* and were invited to participate therein; and they obtained an order to show cause from the Court of Appeals why they should not be granted leave to file an *amicus curiae* brief therein.

12. When the *Second Lewis case* was called for argument in the Court of Appeals on April 11, 1949, counsel for petitioner-appellant Joseph Lewis, over the opposition of counsel for all the respondents in that case (who are likewise respondents in the present proceeding) and over the opposition of this Committee as intervenor-respondent, withdrew his appeal. Upon information and belief, the withdrawal of said appeal of petitioner Joseph Lewis was effected with the knowledge and at the instigation of petitioners Tessim Zorach and Esta Gluck, and with their full consent, and was for the purpose on their part and on the part of their counsel of forestalling and preventing a decision by the Court of Appeals in that case. This intervenor-respondent refers to the Record on Appeal therein with the same force and effect as if it were hereto annexed.

208 *Answer of The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

13. By reason of the judgment of Mr. Justice Elsworth in the *Second Lewis case* and the withdrawal of the appeal of petitioner Joseph Lewis therein under the circumstances above stated, the constitutionality of the New York Statute and Program of Released Time for religious
209 education now attacked by petitioners has been finally adjudged and these petitioners are concluded thereby.

WHEREFORE, intervenor-respondent, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, prays that the application of the petitioners Tessim Zorach and Esta Gluck herein be denied and that their petition be dismissed.

CHARLES H. TUTTLE,
Attorney for The Greater New York
210 Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent,
Office and Post Office Address:
15 Broad Street
Borough of Manhattan
New York 5, N. Y.

CHARLES H. TUTTLE
PORTER R. CHANDLER
LOUIS M. LOEB,
Of Counsel

(Verified by Charles H. Tuttle, Chairman of The Greater New York Coordinating Committee, etc., on June 24, 1949.)

**Reply of Petitioners to Matter Set Forth in the Answer of the Intervenor, Read in Support of Motion to Rescind Regulations and Discontinue Program Respecting Released Time** 211

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

Petitioners, replying to matter, other than denials, set forth in the answer of the intervenor: 212

1. Deny any knowledge or information thereof sufficient to form a belief as to the allegations numbered "5" and "6" of said answer, except that they refer the Court to the Constitution of the United States and the Constitution of the State of New York and authoritative decisions thereunder for a delineation of the rights and lawful authority of citizens of that State and of the United States and except that they deny that, in bringing this proceeding, they are in any way interfering with or doing anything whatever except furthering, the constitutional rights 213 of all citizens of the State of New York and of the United States to have complete freedom of religion and a complete separation of Church and State.

2. Deny each and every allegation contained in paragraphs numbered "7", "8" and "9" of said answer, except that they refer this Court to the record and decisions in the cases referred to in paragraphs numbered "8" and "9" for a full and correct statement of the issues, proceedings and decisions therein.

214 *Reply of Petitioners to Matter Set Forth in the Answer of Intervenor, Read in Support of Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

3. Deny each and every allegation contained in paragraphs numbered "10", "11", "12" and "13" of said answer, except that they admit that they were aware, generally, of the pendency of said proceeding entitled "*Joseph Lewis* v. *Spaulding*" (referred to as the second Lewis Case) when they commenced this proceeding in
215 July, 1948, that that case was thereafter decided by Mr. Justice Ellsworth in the Supreme Court, Albany County, that the petitioner therein, Joseph Lewis, thereafter took an appeal from that decision directly to the Court of Appeals of the State of New York and that thereafter said appeal was withdrawn by said petitioner and that they admit further that an application was made by them, by an order to show cause, in that case in the Court of Appeals for leave to file an *amicus curiae* brief, which application was dismissed by the Court of Appeals when that appeal was withdrawn by said petitioner and except that
216 they refer the Court to the record in that case for a full and correct delineation of the issues, proceedings and decisions therein.

WHEREFORE, the petitioners pray for the granting of the relief requested in their petition herein.

KENNETH W. GREENAWALT,
Attorney for Petitioner,
One Wall Street,
New York 5, New York.

(Verified by Tessim Zorach, one of the Petitioners, on April 18, 1950.)

## Notice of Motion of Petitioners of Restoration to Calendar and for Directing Trial of Triable Issues and Other Relief

217

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that pursuant to the order made by Mr. Justice Beldock at Special Term, Part I, of this Court and entered herein on February 5, 1949, and upon the annexed affidavit of Kenneth W. Greenawalt sworn to April 6, 1950, the undersigned will restore this proceeding to the Calendar and will move this Court at a Special Term, Part I thereof, to be held in and for the County of Kings at the County Court House, Borough Hall, Brooklyn, New York, on the 17th day of April, 1950, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for the following relief: (1) directing a trial in respect of triable issues of fact raised by the pleadings and accompanying papers; (2) the hearing of any objections in point of law in relation to the pleadings; (3) argument upon the merits of petitioners' application; and (4) such other and further relief as may be just and proper.

218

219

Dated: April 6, 1950.

Yours, etc.,

KENNETH W. GREENAWALT,
Attorney for Petitioners,
One Wall Street,
New York 5, New York.

220 *Notice of Motion of Petitioners of Restoration to Calendar and for Directing Trial of Triable Issues and Other Relief*

To:

NATHANIEL L. GOLDSTEIN, Esq.,
Attorney General,
Attorney for Commissioner of Education,
State Office Building,
80 Centre Street,
New York 13, New York.

JOHN P. MCGRATH, Esq.,
221 Corporation Counsel,
Attorney for the Board of Education,
Municipal Building,
New York 7, New York.

CHARLES H. TUTTLE, Esq.,
Attorney for The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics,
15 Broad Street,
New York 5, New York.

222

**Affidavit of Kenneth W. Greenawalt, Read in Support of Petitioners' Motion of Restoration, Etc.** 223

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

State of New York }
County of New York } ss.:

KENNETH W. GREENAWALT, being duly sworn, deposes and says: 224

I am the attorney for the petitioners in the above entitled proceeding. I am entirely familiar with the facts and prior proceedings.

This proceeding was originally commenced by the petitioners on or about July 27, 1948 by the service of a notice of motion dated July 23, 1948, and the petition annexed thereto of the petitioners Tessim Zorach and Esta Gluck verified July 23, 1948. The motion and proceeding were originally returnable at a Special Term, Part I, of the Supreme Court, Kings County, on August 4, 1948. 225

The proceeding was brought under Article 78 of the Civil Practice Act for an order directing the Board of Education of the City of New York and the Commissioner of Education of the State of New York to discontinue certain school practices known as the "released time program" in the New York public schools and especially in public schools Nos. 8 and 130 in Brooklyn, New York, and to rescind and abrogate their regulations authorizing and respecting such released time program.

226 *Affidavit of Kenneth W. Greenawalt, Read in Support of Petitioners' Motion of Restoration, Etc.*

On said return day, August 4, 1948, the Commissioner of Education of the State of New York, pursuant to a "notice of objection on point of law" dated July 29, 1948, made a motion to dismiss the petition in so far as it is addressed to and seeks an order directed against the respondent Commissioner of Education on the ground that the Supreme Court, Kings County, to that extent, is without jurisdiction to entertain this proceeding, or in the alternative, to have the proceeding transferred to the Supreme Court, Albany County. That motion was heard by Mr. Justice Beldock who was sitting at Special Term, Part I, on said original return day. Thereafter, by a decision published in the New York Law Journal on December 30, 1948, and by an order entered February 5, 1949, Mr. Justice Beldock denied that motion.

227

Thereafter the Commissioner of Education, by permission, appealed to the Appellate Division, Second Department, from that order. By a unanimous decision rendered April 4, 1949, the Appellate Division affirmed the order of Mr. Justice Beldock (see 275 App. Div. 774).

228

Thereafter, by permission, the Commissioner of Education appealed to the Court of Appeals. On or about December 29, 1949, the Court of Appeals unanimously affirmed the order of the Appellate Division dated April 4, 1949, and certified that the order of Mr. Justice Beldock entered at Special Term on February 5, 1949, was properly made.

An "order on remittitur" from the Court of Appeals was made in the Appellate Division, Second Department, on January 30, 1950, and

*Affidavit of Kenneth W. Greenawalt, Read in Support of Petitioners' Motion of Restoration, Etc.*

229

said remittitur was duly filed in the Supreme Court, Kings County, on March 1, 1950.

Neither respondent Board of Education nor respondent Commissioner of Education served an answer to the petition upon the original return day. The time of each to serve such an answer was extended by court orders until ten days after the determination of said appeal by the Court of Appeals. Pending said appeals, the proceedings in this proceeding were stayed.

230

On or about January 10, 1950, the respondent Commissioner of Education served an answer to the petition verified January 9, 1950, annexed to which were affidavits or accompanying papers.

On or about January 9, 1950, respondent Board of Education served an answer to the petition verified January 6, 1950, annexed to which were certain affidavits or accompanying papers.

During the pendency of said appeals and on or about May 12, 1949, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics made an application for leave to intervene in this proceeding, which application was granted by a decision published in the New York Law Journal on June 16, 1949, and by an order entered herein on June 20, 1949.

231

On or about June 24, 1949, said intervenor served an answer to the petition verified June 24, 1949.

In Mr. Justice Beldock's order entered February 5, 1949, it was provided that the petitioners would be entitled to restore this matter at Special Term on at least five days' notice for

232 *Affidavit of Kenneth W. Greenawalt, Read in Support of Petitioners' Motion of Restoration, Etc.*

the purpose of a hearing or trial in respect of any contested issues of fact which might be raised by the answers and for the purpose of a hearing upon the merits of their original application.

By their answers the two respondents and the intervenor have raised triable issues of fact.

Now, in accordance with the prior proceedings, and the provisions of Article 78 of the Civil
233 Practice Act, the petitioners are renewing their original motion and restoring the matter for the appropriate hearing or trial, or both.

KENNETH W. GREENAWALT

(Sworn to April 6, 1950.)

234

## Notice of Motion of Intervenor-Respondent, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, For Final Order Dismissing Proceedings

235

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

[SAME TITLE]

SIRS:

236

PLEASE TAKE NOTICE that on the petition, the answers of all the respondents, the affidavits accompanying the same, and the proceedings heretofore had herein, the Intervenor-Respondent will move this Court at a Special Term, Part I thereof, to be held in and for the County of Kings at the Municipal Building, Room 1100-H, Joralemon Street, Brooklyn, New York on April 17, 1950, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order granting the following relief:

237

1. Determining that the Intervenor-Respondent is entitled to a final order dismissing the proceedings on the merits in that the petition fails to state facts sufficient to constitute a cause of action, and in that such respondent is so entitled on the pleadings.

238 *Notice of Motion of Intervenor-Respondent, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, for Final Order Dismissing Proceedings*

2. Granting such further relief as may be just.

Dated, New York, N. Y., April 10, 1950.

Yours, etc.,

CHARLES H. TUTTLE,
Attorney for The Greater New York
239 Coordinating Committee on Released
Time of Jews, Protestants and Roman
Catholics, Intervenor-Respondent,
Office and P. O. Address:
15 Broad Street
New York 5, N. Y.

To:

KENNETH W. GREENAWALT, Esq.
Attorney for Petitioners
1 Wall Street
New York 5, N. Y.

240 NATHANIEL L. GOLDSTEIN, Esq.
Attorney General of the State of New York
Attorney for Respondent Commissioner
of Education of the State of New York
The Capitol
Albany 1, New York

JOHN P. MCGRATH, Esq.
Corporation Counsel of the City of New York
Attorney for Respondent Board of Education
of the City of New York
Municipal Building
New York 7, N. Y.

## Opinion of DiGiovanna, J.

(New York Law Journal)

June 20, 1950

Zorach v. Clauson

By Mr. Justice DiGiovanna.

Matter of Zorach et al. (Clauson, Jr., et al.)—This is an application pursuant to article 78 of the Civil Practice Act for the following relief: 1. Directing a trial in respect of issues of fact raised by the pleadings and accompanying papers; 2. The hearing of any objections in point of law in relation to the pleadings; 3. Argument upon the merits of petitioners' application, and 4. Such other and further relief as may be just and proper.

The petitioners allege that they are citizens, taxpayers and parents of children attending public elementary schools in the Borough of Brooklyn, City of New York. The respondents are the Board of Education of the City of New York, the Commissioner of Education of the State of New York, and The Greater New York Co-ordinating Committee on Released Time of Jews, Protestants and Roman Catholics, as intervenor respondent.

The objective sought by this proceeding is to review the determination of the Board of Education of the City of New York and the State Commissioner of Education in establishing what is commonly known as the "released time program" of religious instruction now in practice in the public schools of this city and elsewhere throughout this state with the ultimate aim of compelling the discontinuance of this program. Varying practices having developed in "released time programs," in order to insure uniformity and legality, the Legislature of the State of New

244 *Opinion of DiGiovanna, J.*

York enacted chapter 305 of the Laws of 1940, amending Education Law 625 (now Education Law, sec. 3210) by adding thereto the following sentence: "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

It is enlightening to quote, at this point the memorandum handed down by Governor Lehman when he signed this bill, which reads as follows: "Under this bill the State Commissioner of Education shall establish rules under which chil-
245 dren may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education. For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: 'Neither
246 the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agent of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules. A few people have given

voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

To effectuate this legislation, the State Commissioner of Education on July 4, 1940, issued the following regulations which, as amended, are "1. Absence of a pupil from school during hours for religious observance and education to be had 248 outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil. 2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies. 3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities. 4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week. 5. Such absence shall be for not more than one hour each week 249 at the close of a session at a time to be fixed by the local school authorities. 6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Thereafter, on November 13, 1940, the Board of Education of the City of New York promulgated the following rules and regulations which are presently in full force and effect: "1. A program for religious instruction may be initiated

by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program. 2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil
251 from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose. Religious organizations, in co-operation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor. 4. Upon the presentation of a proper request as
252 above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough. 5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals. 6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Since the release of any child for one hour a

week for religious instruction is at the option of the parents of the child, the parent who desires to have his or her child so released is required to fill out a card, the form of which is as follows:

"Registration For Released Time Religious Instruction. New York City .....194 ..
To ..... Principal of
..... (School). Please excuse
my child, ..... of grade
..... one hour weekly on
..... throughout the rest of this 254
school year, beginning ..... to
go for religious instruction at .....
..... (Name of Center to which
child is to go). (a) .....
(Signature of parent or guardian). Address
..... Phone
..... (b) Provision has been made
to accommodate and instruct this pupil. .....
..... (Signature of Clergyman). (Card to be retained and filed by the Public School). RS-1."

Such registration cards are prepared and distributed either by the intervenor-respondent, an organization wholly independent of the school system, or by a particular religious organization. No member or employee of either of the other respondents participates in any way in the distribution of the cards, the distribution taking place entirely outside of school premises. No expense of this program is borne directly or indirectly by either of the other respondents. When the card has been filed in the school by the parent and the principal has notified the

teacher that the pupil shall be released at 2 P.M. on the designated day for religious instruction then, without further announcement by the teacher, the child may leave the class and school grounds at the designated time and proceed immediately to the location specified on the card for religious instruction.

Education is a process for the mental, physical and moral development of human beings. Throughout history, man has sought some form of religious worship as an influence toward his 257 moral development. The fundamental idea of a Supreme Being requiring worship has become inbred in the mind of man. The idea of worship in varying forms has prevailed in the minds and hearts of man throughout the ages. Formal religions too numerous and antithetical to be reconcilable, have arisen and flourished; their followers even became mortal enemies because of discord created by diversity of religious beliefs.

When the founding fathers of this country set about their task of adopting an organic law for this new nation, they did not deny the value 258 of religion, but wisely determined that all creeds could live together more harmoniously if no creed was given preference. Therefore, in this country there has been developed a formal separation of church and state, which does not deny the value of any formal religion, but is per se, a guarantee of freedom of worship.

Recognition of the value of religious instruction as an educational contribution to the moral development of man began to take definite shape in this jurisdiction about a quarter of a century ago and has developed into the "released time program." "What more logical advance could

be made in the science of sociology than the unification of religious leaders in a coordinated effort to teach children faith and morality—and for that purpose to excuse them from schools for one hour a week to go to the church or tabernacle or synagogue of their parents' choice?" (Gordon v. Board of Education, 78 Cal., App. Reports [2d Series], 464, 474).

The petitioners labor under the same misconception as did the petitioners in the case quoted immediately above and their concepts were criticized and rejected in the following language: 260
"Throughout her entire argument, appellant misconceives the American principle of religious freedom. What she contends for is freedom *from* religion rather than freedom *of* religion. Appellants' argument leads one to the conclusion that the doctrine of separation of church and state looks upon religion as something intrinsically evil, and against which there should be a rigid quarantine. Nothing is farther from the true concept of the American philosophy of government than such an argument. In the constitution of every state of the union is to be found lan- 261
guage which either directly, or by clear implication, recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the wellbeing of the community" (Gordon v. Board of Education of the City of Los Angeles, supra, p. 476). The lines immediately following cite the preamble to the Constitution of the State of California which is almost exactly the wording of the preamble to the Constitution of the State of New York, which latter reads as follows: "We, the People of the State of New York, grateful to Almighty God for

our Freedom, in order to secure its blessings, Do Establish This Constitution."

It is in recognition of this principle that separation of church and state has never meant freedom *from* religion but rather freedom *of* religion. To permit restraint upon state and local educational agencies which are lawfully authorized to grant released time to our young citizens who wish to take religious instruction would constitute a suppression of this right "of" religious freedom. It is tantamount to a denial of a basic 263 right guaranteed by the letter and the spirit of our American concept of government. It would be a step in the direction of and be consonant with totalitarian and communistic philosophies existing in jurisdictions wherein atheism and the suppression of all religions are preferred to the freedom of the individual to seek religious instruction and worship. Such would be the result or conclusion if the relief sought herein by the petitioners was to be granted.

"Released time programs" have been the subjects of judicial review in many jurisdictions 264 within this country for two and one-half decades. Among the first of these cases was involved the test of a plan used in White Plains, New York, which seems to have been identical with that here attacked. That plan was held constitutional in the Supreme Court at Special Term, in the Appellate Division and in the Court of Appeals without a single dissent: "Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. As a matter of educational policy, the Commissioner doubtless may make proper regulations to

restrict the local authorities when the administration of the plan of week-day instruction in religion or any plan of outside instruction in lay subjects in his judgment interferes unduly with the regular work of the school" (People ex rel. Lewis v. Graves, 245 N. Y., 195, 198).

Subsequent to the decision of the Supreme Court of the United States in McCollum v. Board of Education (333 U. S. 203) another proceeding under article 78, C. P. A., was initiated in an attack upon this program (Matter of Lewis 266
v. Spalding, 193 Misc. 66, appeal withdrawn 299 N. Y. 564). In that proceeding the relief sought was (1) to discontinue the practice of releasing children from regular school attendance, permitting them to receive religious instruction, (2) to discontinue the existing rules or regulations providing therefor, and (3) restraining the adoption of such rules or regulations in the future. The demands therein sought a peremptory order, which was denied; in the instant case, there is in effect a restatement of demands calculated to raise issues of fact. The paramount legal question in the aforesaid case, namely, the constitu- 267
tionality of the statute and regulations, having been determined adversely to the petitioner therein, a similar determination must be reached herein.

The program in operation in the City and State of New York is radically dissimilar from the Champaign Plan, which the United States Supreme Court, in the McCollum case, declared to be unconstitutional; the differences may be illustrated best by setting in apposition distinctive features of both.

| Champaign Plan | New York City Plan |
| --- | --- |
| 1. No underlying enabling State statute. | 1. Education Law §3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish". |
| 269 | |
| 2. Religious training took place in the school buildings and on school property. | 2. Religious training takes place outside of the school building and off school property. |
| 3. The place for instruction was designated by school officials. | 3. The place for instruction is designated by the religious organization in cooperation with the parent. |
| 270 | |
| 4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils. | 4. No element of segregation is present. |
| 5. School officials supervised and approved the religious teacher. | 5. No supervision or approval of religious teachers or course of instruction by school officials. |

| Champaign Plan | New York City Plan |
|---|---|
| 6. Pupils were solicited in school buildings for religious instruction. | 6. School officials do not solicit or recruit pupils for religious instruction. |
| 7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds. | 7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved. |
| 8. Non-attending pupils isolated or removed to another room. | 8. Non-attending pupils stay in their regular classrooms continuing significant educational work. 272 |
| | 9. No credit given for attendance at the religious classes. |
| | 10. No compulsion by school authorities with respect to attendance or truancy. |
| | 11. No promotion or publicizing of the released time program by school officials. 273 |
| | 12. No public moneys are used. |

Section 3210 of the Education Law, as implemented by the respective regulations of the state commissioner and the board of education, is objected to by the petitioners herein as unconstitutional. In Everson v. Board of Education (330

U. S., 1, 16) we are reminded: "* * * we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power." In the same case (pp. 15-16) it is stated that: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person
275 to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organi-
276 zations or groups and vice versa."

The recent and much-quoted decision of the Supreme Court of the United States in McCollum v. Board of Education (supra), which declared unconstitutional the so-called Champaign Plan, was arrived at on the facts of that case. In so doing, Mr. Justice Frankfurter expressly stated (p. 226): "The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied."

And again (p. 227), the same justice said: "Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects."

In the very opinion holding the Champaign Plan unconstitutional, Mr. Justice Frankfurter further said (p. 230): "If that were all, Champaign might have drawn upon the French system, known in its American manifestation as 278
'dismissed time,' whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school."

As a further indication that the plan before this court is consistent with this judicial reasoning, the same court said (p. 231): "We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 279
'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program. We find that the basic Constitutional principle of absolute Separation was violated when the State of Illinois, speaking through its Supreme Court

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sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement."

In discussing the objection that a child whose parents do not choose for him any form of religious instruction may be classed as a dissenter and thereby humiliated, Mr. Justice Jackson, in his concurring opinion, said in the same case (p. 233): "Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be 281 construed also to protect one from the embarrassment that always attends non-conformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground." Coinciding with the views of Mr. Justice Frankfurter, Mr. Justice Jackson in the same case continued (p. 237): "The opinions in this case show that public educational authorities have evolved a considerable variety of practices in dealing with 282 the religious problem. Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error." In what amounts to a summation of the entire proposition involving voluntary re-

ligious instruction, in the same opinion, Mr. Justice Jackson said (p. 235): "To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right 284
as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits."

A careful analysis of the McCollum case leads this court to hold that the present "released 285
time" program contains none of the objectionable features of the plan in that case which was the basis of the decision in the Supreme Court of the United States holding the plan to be unconstitutional. The subsequent decision of the courts in this state in Matter of Lewis v. Spalding (supra) is clearly determinative of the constitutionality of the plan under attack.

The petitioners have, in this proceeding adopted a different prayer for relief from that sought in Matter of Lewis v. Spalding (supra). While

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continuing to attack the constitutionality of the statute and regulations involved, they seek a direction for discontinuance of the regulations on a generalized allegation of maladministration in particular instances, of which no particulars are cited.

However, the practice or practices which may grow up in the matter of administrative details do not affect the constitutionality of the statute involved, for the statute must stand or fall by itself on this question.

287 The attorney for the petitioners, in his memorandum relative to the merits of the petitioner's application and the legal sufficiency of the petition says (p. 9): "It is submitted that it is not the details of a particular released time program which render it violative of the First Amendment; it is the basic concept—the raison d'etre of the program, which causes it to run afoul of the Amendment as interpreted in the Everson and McCollum decisions." However, the majority opinions of Mr. Justice Frankfurter and Mr. Justice Jackson quoted above seem to directly negate this assertion.

288 In the face of a holding that the statute attacked is constitutional, we next come to the question of whether triable issues are presented. What are the issues raised by this proceeding other than the question of constitutionality? There are no degrees of constitutionality. Neither does compliance with the statute render it constitutional if it is unconstitutional, nor does administrative error render it unconstitutional if it is constitutional. It may be, conceivably, that in isolated cases a particular teacher will

fail to conform to the regulatory mandates imposed by the respondents, but if such be the case, the remedy is not the invalidation of a valid statute but the imposition of a disciplinary penalty upon the violator. To prevent or redress particular instances of maladministration, ample machinery of law exists. However, that is not an issue in this special proceeding because no record has been presented of an arbitrary or capricious ruling by the respondents respecting any particular act of maladministration. This 290
court cannot agree, therefore, with the argument of counsel for the petitioners that it has before it the question of whether or not the program is being conducted in accordance with the regulations. Indeed, there is no proof that it is not while there is proof, immaterial to this special proceeding, that it is being so conducted in the particular schools attended by the children of these petitioners. In fact the attorney for the petitioners, in the citation from his brief above quoted, concedes that fact. The question validly presented by this proceeding is solely addressed to the constitutionality of the statute and regu- 291
lations.

Previous motions made and determined by other justices of this court have been in no sense determinative of the issues raised in this proceeding. Mr. Justice Beldock, and the Appellate Division (275 App. Div. 774) distinctly stated that their respective decisions determined only the proper venue. Similarly, neither Mr. Justice Walsh (195 Misc., 531, 534), nor Mr. Justice Hearn made any determination that the petition was immune from attack at this time. As a mat-

ter of fact, The Greater New York Co-ordinating Committee only became a party to this proceeding by permission of Mr. Justice Walsh and the cross-motion of the said intervenor in this proceeding must be considered timely.

From the above, it follows that the first prayer for relief of the petitioners, namely, that a trial be directed of the respective issues of fact raised by the pleadings and accompanying papers, must be denied because no issues exist. The second
293 prayer for the hearing of objections in point of law in relation to the pleadings, has been disposed of by way of lengthy oral argument before this court and submission of voluminous briefs by all the interested parties. The third prayer, that argument be had on the merits of petitioners' application, has been disposed of in the same manner. The court finds that assuming all of the facts set forth in the petition are deemed to be true, nothing has been shown to warrant a finding that section 3210 of the Education Law is unconstitutional or that the regulations adopted by the respondents as required
294 by section 3210, are arbitrary or capricious or unreasonable in law or in fact.

The cross-motion of the intervenor-respondent is granted. The objections of all respondents in point of law to the petition are sustained and the petition is dismissed on the merits as a matter of law.

Submit final order.

## Stipulation Waiving Certification

It is hereby stipulated, pursuant to Section 170 of the Civil Practice Act, that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from, the opinion and all the papers upon which the Court below acted in making said order and opinion, and the whole thereof, now on file in the office of the Clerk of the County of Kings; and certification thereof pursuant to Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated the day of October, 1950.

Kenneth W. Greenawalt,
Attorney for Petitioners-Appellants.

John P. McGrath,
Corporation Counsel,
Attorney for Respondent,
Board of Education of the
City of New York.

Nathaniel L. Goldstein,
Attorney General,
Attorney for Respondent,
Commissioner of Education of
the State of New York.

Charles H. Tuttle,
Attorney for Intervenor-Respondent,
Coordinating Committee on Released
Time of Jews, Protestants and Roman
Catholics.

# ADDITIONAL PAPERS ON APPEAL TO THE COURT OF APPEALS

(See Opposite) ☞

**Notice of Appeal to Court of Appeals** 301

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application of

TESSIM ZORACH and ESTA GLUCK,

*Petitioners-Appellants,*

for an order pursuant to Article 78 of the Civil Practice Act,

*against* 302

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE, and JAMES MARSHALL, constituting the Board of Education of the City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

*Respondents,*

directing them to discontinue certain school practices,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,

*Intervenor-Respondent.* 303

SIRS:

PLEASE TAKE NOTICE that the petitioners above named hereby appeal to the Court of Appeals of the State of New York from the order made in the Appellate Division, Supreme Court, Second Judicial Department, and entered in the office of the Clerk of said Appellate Division on the 15th day of January, 1951, which said order, two Justices dissenting, affirmed a final order of the Supreme Court, Kings County, in the above-

304 *Notice of Appeal to the Court of Appeals*

entitled proceeding, entered in the office of the Clerk of the County of Kings on or about the 24th day of June, 1950; and the petitioners appeal from each and every part of said order and from the whole thereof.

Dated: New York, N. Y., March 13, 1951.

Yours, etc.,

KENNETH W. GREENAWALT,
Attorney for Petitioners,
One Wall Street,
305 New York 5, New York.

To:

Hon. FRANCIS J. SINNOTT,
County Clerk of Kings County,
Hall of Records,
Brooklyn, New York.

Hon. JOHN P. MCGRATH,
Corporation Counsel of the City of New York, Attorney for Respondent, Board of Education of the City of New York,
Municipal Building,
New York, New York.

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Hon. NATHANIEL L. GOLDSTEIN,
Attorney General,
Attorney for Respondent, Commissioner of Education of the State of New York,
80 Centre Street,
New York, New York.

CHARLES H. TUTTLE, Esq.,
Attorney for Intervenor-Respondent, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics,
15 Broad Street,
New York, New York.

## Order of Affirmance of Appellate Division

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At a term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 15th day of January, 1951.

Present—Hon. GERALD NOLAN,
Presiding Justice,
" WILLIAM B. CARSWELL,
" FRANK F. ADEL,
" CHARLES W. U. SNEED,
" HENRY G. WENZEL, JR., Justices.

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In the Matter of the Application of
TESSIM ZORACH and ESTA GLUCK,
*Petitioners-Appellants,*

for an order pursuant to Article 78 of the Civil Practice Act,

*against*

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE, and JAMES MARSHALL, constituting the Board of Education of the City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,
*Respondents,*

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directing them to discontinue certain school practices,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,
*Intervenor-Respondent.*

ORDER ON APPEAL FROM FINAL ORDER

The above named Tessim Zorach and Esta Gluck, the petitioners in this proceeding having

310 *Order of Affirmance of Appellate Division*

appealed to the Appellate Division of the Supreme Court from a final order of the Supreme Court dated June 23rd, 1950, and entered in the office of the Clerk of the County of Kings on June 24th, 1950, denying petitioners' motion for an order directing a trial in respect to issues of fact; granting the cross-motion of the intervenor-respondent for a final order dismissing the proceedings on the merits on the ground that the petition failed to state facts sufficient to constitute a cause of action; sustaining the objections
311 of respondents in point of law to the petition; and denying petitioners' application in all respects and dismissing their petition on the merits as a matter of law, herein, and the said appeal having been argued by Mr. Kenneth W. Greenawalt of Counsel for petitioners-appellants, and argued by Messrs. Charles H. Tuttle and Porter R. Chandler of Counsel for intervenor-respondent, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, and argued by Mr. Michael A. Castaldi, Assistant Corporation Counsel, of
312 Counsel for respondents constituting the Board of Education of the City of New York, and argued by Mr. John P. Powers, Assistant Attorney General, of Counsel for respondent Commissioner of Education of the State of New York, and submitted by Messrs. Theodore Leskes, Will Maslow and Arnold Forster for the American Jewish Committee, the American Jewish Congress and the Anti-Defamation League of B'Nai B'rith, as amici curiae, and submitted by Mr. Frank E. Karelsen, Jr. of Counsel for Public Education Association, as amicus curiae, and submitted by Mr. R. Lawrence Siegel of Counsel

for Committee on Academic Freedom of the American Civil Liberties Union and the New York City Civil Liberties Committee, as amici curiae, and submitted by Mr. Norman Salit of Counsel for New York Board of Rabbis, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed;

It is Ordered that the final order so appealed from be and the same hereby is affirmed, with one bill of $10. costs and disbursements to respondents and intervenor-respondent. Noland, P. J., Carswell and Sneed, JJ., concur; Adel and Wenzel, JJ., dissent and vote to reverse the order and to grant the motion of petitioners for the relief demanded in the petition. 314

Enter:

JOHN J. CALLAHAN
Clerk.

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316 *Order of Affirmance of Appellate Division*

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that an order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the 2nd Judicial Department on the 15th day of January, 1951, and a certified copy of said order was duly filed in the office of the Clerk
317 of the County of Kings on the 30th day of January, 1951.

Yours, etc.,

JOHN P. McGRATH,
Corporation Counsel,
Attorney for Bd. of Educ.
Municipal Building,
Borough of Manhattan,
New York City.

To

KENNETH W. GREENAWALT, Esq.
318 Attorney for Petit.-Applts.
One Wall St., N. Y., N. Y.

NATHANIEL L. GOLDSTEIN, Esq.,
Attorney General
Attorney for Resp.
Comm. of Educ.
80 Centre St.,
N. Y., N. Y.

CHARLES H. TUTTLE, Esq.
Attorney for Interv.-Resp.
The Greater N. Y. Coordinating Committee, etc.
15 Broad St.,
N. Y., N. Y.

## Opinion of Appellate Division

(278 App. Div. 573)

By Nolan, P.J.; Carswell, Adel, Sneed and Wenzel, JJ.

Matter of Zorach and ano., pet-ap (Clauson, Jr., &c., res)—In a proceeding pursuant to article 78 of the Civil Practice Act, petitioners appeal from a final order dated June 23, 1950, which (1) denied petitioners' motion for an order directing a trial in respect to issues of fact; (2) granted the motion of the intervenor-respondent for a final order dismissing the proceedings on the merits on the ground that the petition failed to state facts sufficient to constitute a cause of action; (3) sustained the objections of respondents in point of law to the petition; and (4) denied petitioners' application in all respects and dismissed their petition on the merits as a matter of law. The purpose of the proceeding was to obtain an order, directed to respondent Board of Education and respondent Commissioner of Education, to discontinue the program of released time for religious education in practice in New York City and to rescind the regulations promulgated by both respondents respecting and authorizing such released time program.

Section 3210, subdivision 1-b, of the Education Law provides that absence from attendance upon instruction, as required by that statute, shall be permitted for religious observance and education, under rules that the Commissioner of Education shall establish. Pursuant to such statutory authority, respondent Spaulding, as Commissioner of Education, established the following regulations: "1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in

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writing signed by the parent or guardian of the pupil. 2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies. 3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities. 4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week. 5. Such absence shall be for not more than
323 one hour each week at the close of a session at a time to be fixed by the local school authorities. 6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Thereafter, respondent Board of Education, purporting to act in accordance with the regulations adopted by the Commissioner of Education, established the following regulations: "1. A program for religious instruction may be initiated
324 by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program. 2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be

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filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose. 3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor. 4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be

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dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough. 5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals. 6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

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Petitioners contended, for reasons set forth in their petition, that the regulations so established and the operation thereunder of the "released time program" in New York City, pursuant thereto, prohibited the free exercise of religion in violation of the First and Fourteenth Amendments of the United States Constitution, and section 3, article 1 of the Constitution of the State of New York, and that section 3210 of the Education Law, if construed to authorize the establishment of such regulations and the operation of the released time program thereunder as described in their petition, was also unconstitu-

tional as violative of the First and Fourteenth Amendments of the United States Constitution.

Order affirmed, with one bill of $10 costs and disbursements to respondents and intervenor-respondent.

Subdivision 1-b of section 3210 of the Education Law, which merely provides that absence from attendance on required instruction shall be permitted for the specified religious purposes under rules to be established, is in no way unconstitutional. Moreover, if the truth of all of
329 the well pleaded allegations of the petition is conceded, petitioners have failed to allege facts sufficient to establish any invasion of their constitutional rights by the adoption of the regulations complained of, or the operation thereunder of the "released time program" (cf. People ex rel. Lewis v. Graves, 245 N. Y., 195; Matter of Lewis v. Spaulding, 193 Misc., 66). McCollum v. Board of Education (333 U. S., 203), which may be readily distinguished on its facts does not require a contrary determination.

Nolan, P.J., Carswell and Sneed, JJ., concur.

330 Adel, J., dissents and votes to reverse the order and to grant the motion of petitioners for the relief demanded in the petition, with the following memorandum: The program described in the regulations adopted under section 3210, subdivision 1-b, of the Education Law, and which admittedly is in operation in New York City, is in violation of the constitutional requirement for separation of church and state (McCollum v. Board of Education, 333 U. S., 203).

The elements of the program operated in Champaign, Ill., are factually different from those in the New York City program, in suit, but

the difference in facts requires no different holding. The New York City program is void in that it is integrated with the state's compulsory education system, which assists the program of religious instruction carried on by separate religious sects; in that it releases pupils, who are compelled to attend public schools for secular education, from part of their legal duty upon condition that they attend religious classes; and in that the state's compulsory public school machinery is used to afford aid and assistance to 332 sectarian groups by helping provide pupils for religious classes. Wenzel, J., concurs with Adel, J.

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334 **Stipulation Waiving Certification of Record to the Court of Appeals**

IT IS HEREBY STIPULATED, pursuant to Section 170 of the Civil Practice Act, that the foregoing consists of true and correct copies of the notice of appeal to the Court of Appeals, the order of affirmance of Appellate Division appealed from, the opinion of Appellate Division and all the papers upon which the Court below acted in making said order, and the whole thereof, now on file in the office of the Clerk of the County of
335 Kings; and certification thereof pursuant to Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated the day of April, 1951.

KENNETH W. GREENAWALT,
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Board of Education of the
336 City of New York.

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CHARLES H. TUTTLE,
Attorney for Intervenor-Respondent,
Coordinating Committee on Released
Time of Jews, Protestants and Roman
Catholics.

[fols. 113-114] In Court of Appeals, State of New York

In the Matter of Tessim Zorach et al., Appellants, against Andrew G. Clauson, Jr., et al., Constituting the Board of Education of the City of New York, et al., Respondents, and Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervener, Respondent.

Opinion—Argued May 31, 1951; decided July 11, 1951

Froessel, J. This appeal challenges the constitutionality of the long-standing "released time" program in New York City, whereby parents may withdraw their children from the public schools one hour a week to receive religious instruction in the faith of their acceptance.

For many years released time existed in this State without express statutory authority. Then in 1940, the State Legislature, by an almost unanimous vote and with the approval of Governor Lehman (1940 Public Papers of Governor Lehman, p. 328), added (L. 1940, ch. 305) to the Education Law, which governs, among other things, the attendance of minors in schools, the following provision: "Absence for religious observance and education shall be permitted under rules that the commissioner [of education] shall establish."

Pursuant to this provision, which is now found in paragraph b of subdivision 1 of section 3210 of the Education Law, the State Commissioner of Education has promulgated the following rules (Regulations of Comr. of Educ., art. 17, § 154; 1 N. Y. Official Compilation of Codes, Rules and Regulations, p. 683):

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

[fol. 115] "4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Additional rules have been established by the New York City Board of Education:

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

"2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

"3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough.

"5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

[fol. 116] "6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Appellants, parents of children attending public schools in New York City who do not avail themselves of this program and are in nowise obliged to do so, challenge by this article 78 proceeding the constitutionality of the foregoing statute and rules *in toto*, upon the ground that they violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Federal Constitution, as applied to the States by the Fourteenth Amendment, and prohibit the free exercise of religion in violation of the First and Fourteenth Amendments of the Federal Constitution and section 3 of article I of our State Constitution. The courts below have denied them relief and dismissed the proceeding.

In support of their contention, appellants rely primarily on *Illinois ex rel. McCollum* v. *Board of Educ.* (333 U. S. 203). There, a local board of education in Champaign County, Illinois, participated in a released time program which differed radically from the one before us. There was no underlying State enabling act. Religious training took place in the school buildings and on school property. The place for instruction was designated by the school authorities. Pupils taking religious instruction were segregated by school authorities according to faiths. School officials supervised and approved the religious teachers. Pupils were solicited in school buildings for religious instruction. Registration cards were distributed by the school, and in one case printed by the school. None of these factors is present in the case before us, and, accordingly, the Supreme Court's holding that the Champaign released time program was constitutionally invalid is not controlling here.

In the New York City program there is neither supervision nor approval of religious teachers and no solicitation of pupils or distribution of cards. The religious instruction must be outside the school building and grounds. There

must be no announcement of any kind in the public schools relative to the program and no comment by any principal or teacher on the attendance or nonattendance of any pupil upon religious instruction. All that the school does besides [fol. 117] excusing the pupil is to keep a record—which is not available for any other purpose—in order to see that the excuses are not taken advantage of and the school deceived, which is, of course, the same procedure the school would take in respect of absence for any other reason.

It is manifest that the *McCollum* case (*supra*) is not a holding that all released time programs are *per se* unconstitutional. The Supreme Court's decision is limited to the fact situation before it. Thus, Mr. Justice Black, writing for the court, reviewed the evidence so far as undisputed and stated (p. 209) that the foregoing *facts*" (emphasis supplied) "show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education."

In the instant case, there is no "use" of tax-supported "property or credit or any public money" "directly or indirectly" "in aid or maintenance" of religious instruction (*People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, 198, motion for reargument denied 245 N. Y. 620, affg. 219 App. Div. 233, affg. 127 Misc. 135), and there is no such co-operation as in the *McCollum* case (*supra*) between the school authorities and the religious committee in promoting religious education.

Other Justices who wrote in the *McCollum* case (*supra*) were even more explicit in placing boundaries on the determination. Mr. Justice Frankfurter, in a concurring opinion in which three other Justices joined, stated:

"Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication." (P. 225.)

"The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does 'released time' operate in Champaign?" (P. 226.)

"We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty [fol. 118] years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable." (P. 231.)

Mr. Justice Jackson, in addition to agreeing with the limitations expressed by Mr. Justice Frankfurter, added reservations of his own, and stated: "we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain" (p. 232), and that "it is important that we circumscribe our decision with some care." (P. 234.)

Mr. Justice Reed, who dissented from the court's holding, pointed out (pp. 239-240) that expressions in the opinions of his colleagues "seem to leave open for further litigation variations from the Champaign plan." Thus, in addition to the reference in the court's opinion to the "foregoing facts" of the Champaign plan as showing its unconstitutionality, we have five other Justices expressly agreeing that released time as such is not unconstitutional.

Binding precedent must therefore be found in our own decision of nearly twenty-five years ago in *People ex rel. Lewis* v. *Graves* (*supra*), which involved a released time program in the city of White Plains. Such program, except for the absence of a State enabling act, was substantially the same as the one now in issue. Judge Pound, writing for a unanimous court, its other distinguished members having been Chief Judge Cardozo, and Judges Crane, Andrews, Lehman, Kellogg and O'Brien, there said (p. 198, 199):

"A child otherwise regular in attendance may be excused for a portion of the entire time during which the schools are in session, to the extent at least of half an hour in each week, to take outside instruction in music or dancing without violating the provisions of the Compulsory Education Law, either in letter or spirit. Otherwise the word 'regularly' as used in the statute would be superfluous. Practical administration of the public schools calls for some elasticity in this regard and vests some discretion in the school authori-

ties. Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. * * *

[fol. 119] "The separation of the public school system from religious denominational instruction is thus complete. Jealous sectaries may view with alarm the introduction in the schools of religious teaching which to the unobservant eye is but faintly tinted with denominationalism. Eternal vigilance is the price of constitutional rights. But it is impossible to say, as matter of law, that the slightest infringement of constitutional right or abuse of statutory requirement has been shown in this case."

To like effect are *Gordon* v. *Board of Educ. of City of Los Angeles* (78 Cal. App. 2d 464, review denied 78 Cal. App. 2d 481) and *Matter of Lewis* v. *Spaulding* (193 Misc. 66, appeal withdrawn 299 N. Y. 564).

Two years before our decision in the first *Lewis* case, it had been "assumed" by the Supreme Court that freedom of speech and of the press, likewise guaranteed by the First Amendment, were protected by the due process clause of the Fourteenth Amendment (*Gitlow* v. *New York*, 268 U. S. 652, 666), and, while the appellant in the *Lewis* case laid greater stress on section 4 of article IX (now art. XI, § 4) of the New York Constitution, he expressly urged in his petition the violation "of the constitutional guarantees of the New York State and the United States Constitutions respecting religious liberty and the separation of church and state". Nevertheless we held that the released time program did not breach the so-called "wall of separation" between church and state.

No metaphorical "wall" that mere words can build ever precisely and mathematically delineates a constitutional right. The Supreme Court has recognized, in a religious freedom case that to "make accommodation between these freedoms" guaranteed by the First Amendment and "an exercise of state authority" is always "delicate" (*Prince* v. *Massachusetts*, 321 U. S. 158, 165). Such freedoms are not absolute (*Prince* v. *Massachusetts*, *supra*, p. 166; *Dennis* v. *United States*, 341 U. S. 494; *Breard* v. *Alexandria*, 341 U. S. 622; *Schenck* v. *United States*, 249 U. S. 47). Numerous situations involving some incidental benefit to re-

ligion have been found constitutionally unexceptionable (see, e.g., *Everson* v. *Board of Educ.*, 330 U. S. 1; *Cochran* v. *Louisiana State Bd. of Educ.*, 281 U. S. 370; *Bradfield* v. [fol. 120] *Roberts*, 175 U. S. 291). Tax exemption of church properties (Tax Law, § 4, subd. 6) is but another of many illustrations, and the practice is generally followed. Very recently, in upholding the Sunday law, we have recognized that separation of church and State does not mean that every State action remotely connected with religion must be outlawed (*People* v. *Friedman*, 302 N. Y. 75, appeal dismissed for want of a substantial Federal question, 341 U. S. 907).

It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called "wall of separation" may be built so high and so broad as to impair both State and church, as we have come to know them. Indeed, we should convert this "wall", which in our "religious nation" (*Church of Holy Trinity* v. *United States*, 143 U. S. 457, 470) is designed as a reasonable line of demarcation between friends, into an "iron curtain" as between foes, were we to strike down this sincere and most scrupulous effort of our State legislators, the elected representatives of the People, to find an accommodation between constitutional prohibitions and the right of parental control over children. In so doing we should manifest "a governmental hostility to religion" which would be "at war with our national tradition" (*Illinois ex rel. McCollum v. Board of Educ., supra*, p. 211) and would disregard the basic tenet of constitutional law that "the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution" (*Atkin* v. *Kansas*, 191 U. S. 207, 223).

While extreme care must, of course, be exercised to protect the constitutional rights of these appellants, it must also be remembered that the First Amendment not only forbids laws "respecting an establishment of religion" but also laws "prohibiting the free exercise thereof". We must not destroy one in an effort to preserve the other. We cannot, therefore, be unmindful of the constitutional

rights of those many parents in our State (we are told that some 200,000 children are enrolled in the released time programs in this jurisdiction, and ten times as many throughout the nation) who participate in and subscribe to such programs. The right of parents to direct the rearing and education of their children, free from any general power of the State to standardize children by forcing them to accept instruction from public school teachers only, is an unquestioned one (*Pierce* v. *Society of Sisters*, 268 U. S. 510), and, more recently, the nation's highest judicial tribunal has declared: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder" (*Prince* v. *Massachusetts, supra*, p. 166).

[fol. 121]

Because the public school must be kept separate and apart from the church, pupils may not constitutionally receive religious instruction therein. All that New York parents ask then is that their children may be excused one hour a week for that purpose. The New York City Board of Education provides more days for secular instruction than required by law (Education Law, § 3204, subd. 4). The Education Law does not fix the number of hours that constitute a school day. Excuses from attendance are permitted for many good reasons; among others, children are excused from school on holy days set apart by their respective faiths, thus producing a most obvious form of divisiveness, not paralleled in the released time program. Indeed we are all agreed that refusal to excuse children for that reason would be an unconstitutional abridgement of freedom of religion. If it be constitutional to excuse children of a particular faith for entire days for such a religious purpose, it seems clear, by a parity of reasoning, that it is also constitutional, under the circumstances here presented, to excuse children of whatever faith one hour a week for another and similar religious purpose. The statute (Education Law, § 3210, subd. 1, par. b) authorizes absence for both "religious observance and education".

Moreover, parents have the right to educate their children elsewhere than in the public schools, provided the State's minimum requirements are met (Education Law, § 3204; *Pierce* v. *Society of Sisters, supra*), and thus, if they wish,

choose a religious or parochial school where religious instruction is freely given. That being so, it follows that parents, who desire to have their children educated in the [fol. 122] public schools but to withdraw them therefrom for the limited period of only one hour a week in order to receive religious instruction, may ask the public school for such permission, and the school may constitutionally accede to this parental request. There is nothing in the Constitution commanding that religious instruction may be given on the Sabbath alone, and on no other day.

Appellants assert that in any event triable issues of fact are presented. A basic difficulty with this contention is that appellants now declare that they are prepared to show on a trial matters that have not even been properly pleaded. A great many of their allegations are conclusory in character (*Kalmanash* v. *Smith*, 291 N. Y. 142, 154), and, as appellants concede, have been lifted bodily from portions of the *McCollum* opinions, without the statement of adequate facts to support them (Civ. Prac. Act, § 1288). As the Appellate Division said, "if the truth of all of the *well-pleaded* allegations of the petition is conceded, petitioners have failed to allege *facts* sufficient to establish any invasion of their constitutional rights" (emphasis supplied; 278 App. Div. 573, 575).

Moreover, many of the conclusory allegations suggest merely a disobedience of the rules and regulations. Such disobedience, while it might warrant the initiation of disciplinary proceedings against any of the offending teachers or principals, would in nowise warrant the relief prayed for, namely, a total discontinuance of the released time program and a rescission of all regulations established by the authorities. It is, of course, possible that a statute and regulations constitutional on their face may be administered in an unconstitutional way (*Snowden* v. *Hughes*, 321 U. S. 1; *Yick Wo* v. *Hopkins*, 118 U. S. 356), but in order to invoke this principle it must appear that there is "an element of intentional or purposeful discrimination" by the enforcement authorities (*Snowden* v. *Hughes*, *supra*, p. 8). Here there is no allegation in the petition to that effect, and, indeed, even in appellants' brief and in the briefs *amici* supporting their position, "The offer of proof

was not an offer to show a pattern of discrimination consciously practiced" (*People* v. *Friedman*, *supra*, p. 81). Under the circumstances, whether the released time program is constitutional is solely a question of law, and the [fol. 123] case has been so treated by Special Term as well as by the Appellate Division majority and dissenters.

The order of the Appellate Division should be affirmed, with costs.

LOUGHRAN, Ch. J. (concurring). I vote to affirm the order of the Appellate Division upon the authority of *People ex rel. Lewis* v. *Graves* (245 N. Y. 195).

DESMOND, J. (concurring). This is a mandamus-type proceeding (Civ. Prac. Act, art. 78) brought to compel the New York City Board of Education and the State Commissioner of Education, to discontinue and abolish the so-called "released time program" in the city's public schools, on the alleged ground that the release of children from those schools, for one hour a week, at the request of parents, to attend outside religious instruction in their several faiths, violates the Federal Constitution as to its First Amendment, made applicable to the States by the Fourteenth Amendment. Specifically, it is the contention of petitioners that the program as conducted in New York City, and the State statute and State and local regulations under which it operates "are violative of the U. S. Constitution within the principles set forth in the *McCollum* decision" that is, *Illinois ex rel. McCollum* v. *Board of Educ.* (333 U. S. 203). I vote for affirmance, because I see no basis for any claim of unconstitutionality.

The First Amendment, which is not quoted at any place in the petition or in the briefs of petitioners and their supporters, forbids the making of laws "respecting an establishment of religion, or prohibiting the free exercise thereof". Neither of those prohibitions, in language or meaning, has anything whatever to do with this released time system. The *McCollum* case (*supra*), is not controlling on us here, since the Champaign, Illinois plan, there struck down as unconstitutional, differed from the New York program in a number of important respects, principally in that religious training took place in the classrooms of the Champaign public schools (one of the "chief reasons" for the decision, says Justice JACKSON in a note in the *Kunz* v. *New*

*York* dissent, 340 U. S. 290, 311), some public funds were spent in Champaign, the religious teachers there were chosen with the approval of the public school officials, and pupils were, in the Champaign school buildings, solicited [fol. 124] for religious instruction. If we are to decide this case on precedent, we must follow our own decision in *People ex rel. Lewis* v. *Graves* (245 N. Y. 195), where we upheld, as against claims that it contravened both the Federal and State Constitutions, a released time plan identical with the one now before this court. It must be conceded, of course, that there are, scattered through the several lengthy opinions in *McCollum*, expressions which can be read to proscribe all released time programs, including this one. But *stare decisis* does not mean *stare verbis*, and until the New York plan, or one just like it, confronts the Supreme Court, there will be no precedent binding on us.

Before turning to a somewhat more thorough discussion of the constitutional question, I mention another separate ground for affirmance. Petitioners are, according to the petition, the parents of pupils in New York City schools where this plan operates. Their children do not take part in the program but each receives religious instructions at religious schools, outside public school hours. It is indeed difficult to see how the release of other parents' children impinges in any way at all, on any "right" of petitioners. True, they allege that the operation of the released time program "inevitably results" in coercion on parents and children to attend religious instruction, but it is clear that no such "inevitable" result has befallen petitioners or their children. The *Lewis* case (*supra*) in this court can, I suppose, be read as holding that these petitioners, as citizens, have standing to bring this mandamus proceeding, but I suggest the point will bear reinvestigation. It is far-fetched to say that petitioners are aggrieved by the continuance of a program which has no effect on them or their children, and which does not involve the use of public buildings, property or funds.

I return to the alleged constitutional question, which needs must be one under the Federal Bill of Rights, since an extramural religious education project, just like this one, was expressly held, in the *Lewis* case (*supra*), not to be interdicted by our State Constitution (art. XI, § 4). Our

duty then (unhampered by *McCollum* which is not controlling) is to lay the plain facts of this released time system over against the plain words of the First Amendment. The amendment, lavishly alluded to but seldom quoted, bans, in [fol. 125] lucid, specific words, the making of any law" "respecting an establishment of religion, or prohibiting the free exercise thereof". The New York released time setup is authorized by a statute (Education Law, § 3210), which permits absences from public schools "for religious observance and education", under rules to be established by the State Commissioner. In approving its passage, Governor Lehman, whose devotion to constitutional liberties needs no encomium, characterized as groundless the fears expressed by some that it "violates principles of our government" and stated: "The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system" (1940 Public Papers of Governor Lehman, p. 328). The regulations adopted by the State Education Commissioner, and by respondent New York City board (taking both sets of regulations together) excuse the absence from school, for one hour a week at the close of a daily session, of any pupil, whose absence is requested by his parent or guardian for attendance at, and, who does attend, a religious education course conducted under the control of one or more duly constituted religious bodies, each such pupil to be registered for the religious course with, and his attendance thereat reported to, the public school authorities, no announcement of any kind relative to the program to be made in the public school, but notification to come to parents from the religious organization only, no comment to be made by any principal or teacher of attendance or nonattendance of any pupil at the religious classes, and no responsibility for attendance thereat to be assumed by the public school but solely by the religious organizations, which, co-operating with parents, must file with the public school principal weekly, a statement of attendance at, or absence from the religion classes, of any pupil enrolled in the latter, with a statement of reasons for absences therefrom. Just where in all that is there "an establishment of religion" or a prohibition of "the free exercise thereof"? Characterization of such a program as "divisive" or "oppressive" or "co-

ercive" is meaningless on a question of constitutional law. What petitioners are saying is that they dislike the whole enterprise, and consider it socially undesirable. Those are predilections, not questions of law.

[fol. 126] The basic fundamental here at hazard is not, it should be made clear, any so-called (but nonexistent, as I shall try to show) "principle" of complete separation of religion from government. Such a total separation has never existed in America, and none was ever planned or considered by the founders. The true and real principle that calls for assertion here is that of the right of parents to control the education of their children, so long as they provide them with the State-mandated minimum of secular learning, and the right of parents to raise and instruct their children in any religion chosen by the parents (*Pierce* v. *Society of Sisters*, 268 U. S. 510; *Meyer* v. *Nebraska*, 262 U. S. 390; *Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184, 192). Those are true and absolute rights under natural law, antedating, and superior to, any human constitution or statute.

I cannot believe that the Chief Justice of the United States, in his opinion for the Supreme Court majority in *Dennis* v. *United States* (341 U. S. 494, 508), meant, literally, what he wrote: "that there are no absolutes" and that "all concepts are relative". Of course, even the constitutional rights of freedom of speech and freedom of religion are, to a degree, nonabsolute, since their disorderly or dangerous exercise may be forbidden by law. But embodied within "freedom of religion" is a right which is absolute and not subject to any governmental interference whatever. Absolute, I insist, is the right to practice one's religion without hindrance, and that necessarily comprehends the right to teach that religion, or have it taught, to one's children. That anything in the United States Constitution means, or could ever be tortured into meaning, that our basic law is violated by an arrangement whereby parents take their own children from the common schools, for one hour a week for instruction in their religion, is beyond my comprehension. As Dean Pound has lately reminded us, our American bills of rights "in their significant provisions are bills of liberties" (New Paths of the Law, p. 7). The New York released time system is a mere method for the

exercise of the religious liberties of the parents of public school pupils, and infringes on no rights of anyone, since no one else's rights are in any way affected.

[fol. 127] By what process, then, in the teeth of those fundamentals, is an argument contrived for the proposition that this release of children from secular schools for religious education amounts to "an establishment of religion" or prohibits the free exercise thereof? The answer is: the argument construes the First Amendment by ignoring its language, its history and its obvious meaning, and by substituting, for its plain wording, and intendment, the metaphor (FRANKFURTER, J., in the *McCollum* case, 333 U. S. 203, 231, *supra*) or loose colloquialism of "a wall between church and State". That the "wall" has never been more than a figure of speech, is clear from the context in which it was first used by Jefferson (see as quoted by Justice REED in the dissent in *Illinois ex rel. McCollum* v. *Board of Educ.*, *supra*, p. 245, n.). Quite recently, the Supreme Court itself, in two of its careful opinions in the *Dennis* case (*supra*), has warned us against encasing truth in a "semantic straitjacket" (Chief Justice's opinion, p. 508) or attempting to decide great constitutional issues by the use of a "sonorous formula" (concurring opinion of Justice FRANKFURTER, p. 519). To dispose of this "unbreachable wall" or "impassable gulf" idea, we need only apply here the simple, lucid test proposed by Justice FRANKFURTER in that same *Dennis* opinion: "not what words did Madison and Franklin use, but what was in their minds which they conveyed?" (P. 523.) What was in the minds of the founders is writ as large and plain as anything on history's pages, and there is not the slightest possible warrant for ascribing to them an intent to interfere (in the guise of a "Bill of Rights"!), with parents' religious indoctrination of their own children.

One of the curiosities of history is the enlarged and distorted meaning currently being given, by some, to the simple phrase of the First Amendment: "an establishment of religion". It must be the rule as to constitutions, just as to statutes, that there is "no occasion for construction" when the phrasing "is entirely free from ambiguity" (*Wright* v. *United States*, 302 U. S. 583, 589; 1 Cooley's Const. Limi-

tations [8th ed.], pp. 124-126; *Matter of Carey* v. *Morton*, 24 N. Y. 361, 366). The language of a constitution is to be given its ordinary meaning (*Wright* v. *United States*, and [fol. 128] *Matter of Carey* v. *Morton*, *supra*). The fundamental purpose in construing it is to ascertain and give effect to the intent of the framers and of the people who adopted it, keeping in mind the objects sought to be accomplished and the evils sought to be prevented or remedied. Under any or all those rules and tests (and they are all one), what is the meaning of "an establishment of religion"? The Supreme Court itself gave us the answer in *Cantwell* v. *Connecticut* (310 U. S. 296, 303): "it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." "Established" churches were well known to the colonists, who had experienced them in Europe and America. They knew that the phrase meant "a state church, such as for instance existed in Massachusetts for more than forty years after the adoption of the Constitution" (Corwin, Constitution and What it Means Today [9th ed.], pp. 155-156). When the Constitution was adopted there were still established churches in five of the States, and a few years earlier there had been nine of them in the thirteen colonies (O'Neill, Religion and Education under the Constitution, p. 97). "Establishment" of a church or religion always and necessarily means an act of government favoring one particular church or group of churches. Historically, that is exactly what the amendment meant to the framers of the Constitution and to the Congress and the people who adopted it. Despite all the "historical" gloss, there is one only exposition in the Annals of Congress of the meaning, and no contemporary proofs to the contrary. Madison, the author, said during the First Congress (Annals of Congress for August 15, 1789, Vol. I, p. 758) that the amendment mandated: "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience". The necessity for the amendment, he went on to say, was a fear by some that Congress might otherwise have power to "make laws of such a nature as might infringe the rights of conscience, and establish a national religion" and he repeated that the amendment was intended "to prevent these effects".

Finally, he noted that the amendment was being added because "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform". Such fears [fol. 129] had indeed been expressed during the campaign to ratify the Constitution as originally drawn (see Van Doren, The Great Rehearsal, pp. 217, 237). No one at that time, or for years thereafter, so far as I can discover, ever attributed to the First Amendment any broader meaning. It is inconceivable that it was ever meant to prohibit governmental encouragement of, or cooperation with, religions generally. As Judge STORY pointed out in his Commentaries (Vol. II [5th ed.], pp. 630-631) the "general if not the universal sentiment in America was, that Christianity ought to receive encouragement".

I realize that much broader scope may seem to have been accorded to the First Amendment, by the Supreme Court, in the *Everson* v. *Board of Educ.* (330 U. S. 1) and *McCollum* decisions. But if such a broadening was intended in *McCollum* and *Everson* (*supra*), it has, I say with respect, no basis in the only history which is pertinent: the history of the drafting and adoption of the amendment itself. Indeed, that seems to have been conceded by the Justices who were in the majority in the *McCollum* case (see Justice FRANKFURTER, concurring, pp. 217-220 of 333 U. S.). So experienced and proficient a modern commentator as Charles P. Curtis says, while approving the *McCollum* holding, that the court reached its decision without "any justification whatever in what the Constitution says, and even less in what those who wrote it intended it to mean" (Curtis, Modern Supreme Court, Vanderbilt L. Rev., Vol. 4, No. 3, p. 438). Indeed, Curtis surmises "that the First Congress would have rephrased the First Amendment to exclude the release of school time for religious teaching, if it had then been one of the issues of the day." The surmise is not a particularly daring one, as to those early Americans, nearly all of whose schools were religious in spirit and foundation, and who then, or just before or after, invoked the Deity in their Declaration of Independence, established chaplaincies, expressed their trust in God on their coins, and sang "America" part of which is a prayer to God to "protect us by Thy might". The spirit of those times was

that of Washington telling us in his Farewell Address that national morality cannot "prevail in exclusion of religious principle" and Edmund Burke, across the sea, warning [fol. 130] that "religion is the basis of civil society, and the source of all good and comfort". (Reflections on the Revolution in France.) Mr. Curtis says that *Everson* and *McCollum* represent judicial work "wise and well done" but his reason for that personal judgment is that he thinks that "such a use of release time would have a bad effect on our public schools" inculcating a feeling of separatism, etc. Perhaps so, but what has all that to do with the Constitution, and is it anything more than a disguised plea that the court be allowed to rewrite or amend the Constitution, to accomplish what seems, at the moment and to the incumbents, the better social policy?

Learned writers on law justify this sort of constitutional exegesis, and urge that "a written constitution, which is frequently thought to give rigidity to a system, must provide flexibility if judicial supremacy is to be permitted" (Levi, An Introduction to Legal Reasoning, p. 42). Rejected by them is the suggestion that "the interpretation ought to remain fixed in order to permit the people through legislative machinery, such as the constitutional convention, or the amending process, to make a change" (Levi, *id.*). The answer, says the same author, is that "a written constitution must be enormously ambiguous in its general provisions". General and sweeping, yes. But not ambiguous. Being a constitution, it should state basic law in broadest outline, available for specific applications as needed. But it cannot, I suggest, be ambiguous and be at the same time a constitution. And, regardless of all this, a particular constitution may use definite, one-shot, one-meaning words, and when such are found, as we find them here in the First Amendment, no process of legal reasoning can make them mean something else, or serve some new and unintended purpose.

Petitioners, lacking support in precedent or history, fall back on assertions that this released time method gives religion "active cooperation" and "aid in obtaining pupils" for the off-campus religious classes. If proof of such cooperation, aid and encouragement could lead to a conclusion of law that the scheme is unconstitutional, then a trial of

those allegations would be in order, and the dismissal of the petition below, without a trial, would be wrong. But [fol. 131] governmental aid to, and encouragement of, religions generally, as distinguished from establishment or support of separate sects, has never been considered offensive to the American constitutional system. If they are inimical to our fundamental law, then every President has offended by invoking the Deity in his oath of office, by issuing Thanksgiving proclamations and calling on our people to pray for victory in war, or for peace, or for our soldiers' safety. If petitioners are right, then there is a violation every time a chaplain opens a Congressional session with prayer, or an army bugler sounds "Church call". If petitioners are right, then the Pilgrims were wrong, as was every President who officially urged our people to train themselves in, and practice, religion. Our own State Constitution, on petitioners' theory, offends against American constitutionalism at the point in its preamble where it expresses gratitude "to Almighty God" for our freedom. Petitioners would have this court now deny the declarations of the Supreme Court in the *Church of Holy Trinity* v. *United States* case (143 U. S. 457) and of Chief Justice KENT in the *People* v. *Ruggles* case (8 Johns. 290) in 1811, that ours is a religious nation. I stand on Chief Justice KENT's declaration, long ago in the *Ruggles* case (p. 296), that the Constitution "never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law."

The order should be affirmed, with costs.

FULD, J. (dissenting). On federal constitutional questions, the Supreme Court of the United States is, of course, the final arbiter, and, concerning the impact of the First Amendment upon religious instruction and the public school, it has recently spoken. That Amendment, the Supreme Court declared, "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. * * * the First Amendment has erected a wall between Church and State which must be kept high and impregnable." (*Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 212.) In the light of that principle,

the court ruled, the Amendment prevents the passage of any laws "which aid one religion, aid all religions, or prefer one religion over another." (*Illinois ex rel. McCollum* v. [fol. 132] *Board of Education, supra*, 333 U. S. 203, 210; *Everson* v. *Board of Education*, 330 U. S. 1, 15.)

Drawing authority and direction from section 3210, subdivision 1b, of the Education Law, as amended in 1940, and rules and regulations promulgated by the New York State Commissioner of Education (Regulations of Comr. of Educ., art. 17, § 154; 1 N. Y. Official Compilation of Codes, Rules and Regulations, p. 683), the New York City Board of Education has made provision for a plan of religious instruction by individual sects for the training of public school students. The instruction is given on public school time, but not on public school property. The rules direct that, upon the written request to the school by a parent and a "duly constituted religious body" "prepared to initiate a program for religious instruction," a child is to be released from his regular classes for such instruction for one hour a week; and the public schools are required to maintain records of attendance at these religious courses and of the reasons for absence therefrom. Those children whose parents do not wish them to attend or whose religious sect has not set up a program of instruction in co-operation with the public school's regimen are kept in school to receive what the Superintendent of Schools of the City of New York refers to as "significant education work".

Petitioners challenge that program as a breach of the wall of separation erected by the First Amendment. Their standing is not questioned by respondents and many of the allegations of their petition are not disputed. They are United States citizens, residents, taxpayers and property owners in Kings County and parents of children attending public schools in the Borough of Brooklyn, New York City, where the "released time" program is in operation. Their children do not utilize that program, but instead receive regular religious instruction outside of public school hours at religious schools of their respective faiths—Zorach's child at a Protestant Episcopal religious school and Gluck's children at a Jewish religious school. Asserting that other children in the public schools are released regularly from classes for one hour each week on condition that

they attend courses for sectarian religious instruction at religious centers, petitioners seek an order directing the State Commissioner and the City Board to discontinue the program and rescind their regulations.

[fol. 133] Denied, but deemed admitted for the purposes of this motion to dismiss the petition (see, e.g., *Matter of Hines* v. *State Bd. of Parole*, 293 N. Y. 254, 258; *Matter of Schwab* v. *McElligott*, 282 N. Y. 182, 185-186), are the further allegations of the petition that the Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics "cooperates closely with the public school authorities" in managing the program and in "promoting religious instruction"; that "the system necessarily entails use of the public school machinery and time of public school principals, teachers and administrative staff"; that "the compulsory education system . . . assists and is integrated with the program of sectarian religious instruction carried on by separate religious sects"; that it "has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction"; that it "has resulted and inevitably will result in divisiveness because of difference in religious beliefs and disbeliefs"; and that "limiting" participation in the "program to 'duly constituted religious bodies' effects an unlawful censorship of religion and preference in favor of certain religious sects."

In its present posture, the case before us presents the simple question whether the program just described is infected with the same constitutional infirmity that the United States Supreme Court found in *Illinois ex rel. McCollum* v. *Board of Education* (*supra*, 333 U. S. 203). And, though it is ultimately upon the meaning of the First Amendment that the answer to that question depends, we are no longer free since the *McCollum* decision to place our own meaning or gloss upon that Amendment, but must read it as has the Supreme Court.

While the Champaign "released time" system which was condemned in that case differed in details from that here complained of, the court's conclusion and the principles which it enunciated are broad in scope and clearly reach far beyond the precise fact situation there presented.

In fixing upon the exact holding of the Supreme Court, there may be room for argument as to which phrase, separated from context, best reflects the sense to be distilled from the several opinions written, but there can be no doubt [fol. 134] whatsoever as to the net result. Mr. Justice REED, dissenting alone, recorded the common ground and ultimate conclusion of his brethren's opinions with the statement (333 U. S., at p. 240): "From the tenor of the opinions I conclude * * * that *any use of a pupil's school time, whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban.*" (Emphasis supplied.)

Regarding the principles enunciated by the court, the first tenet was that the First Amendment has erected a wall "high and impregnable" between Church and State and that the state must maintain a strict neutrality, neither suppressing nor supporting religion. Speaking for a majority of six judges, Mr. Justice BLACK wrote (333 U. S., at pp. 210-211): "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. * * * In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

That wall was breached by the released time program in Champaign, according to the court, since by it the state effectively aided religion in two respects—(1) by making the public school buildings available and (2) by providing pupils for this or that sect's religious classes. Mr. Justice BLACK made this exceedingly plain in the following passages (pp. 209-210, 212):

"Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment. [pp. 209-210]

* * *

"Here not only are the State's tax-supported public school buildings used for the dissemination of religious doc-

trines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State. [p. 212]"

[fol. 135] Not only by direct command, but also by the pressures inherent in the functioning of the program did the Champaign system effect a breach of the wall. "The Champaign arrangement", Mr. Justice FRANKFURTER, concurring, said, "thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. * * * That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend" (p. 227).

It is not that the First Amendment begrudges the use of a portion of the school day for religious instruction that condemned the Champaign program. Rather, the objection was the utilization by state authority of the "momentum of the whole school atmosphere and school planning" behind released time: "If it were merely a question of enabling a child to obtain religious instruction with a receptive mind, the thirty or forty-five minutes could readily be found on Saturday or Sunday. If that were all, Champaign might have drawn upon the French system, known in its American manifestation as 'dismissed time,' whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school. The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning. To speak of 'released time' as being only half or three quarters of an hour is to draw a thread from a fabric" (per FRANKFURTER, J., concurring, 333 U. S., at pp. 230-231).

The statute, the regulations and the pleadings in the record before us similarly make plain the use of the state's compulsory public school machinery, its atmosphere and its

momentum. The vice in the use of such machinery to provide pupils for the religious classes is as predominant a factor in the present case as it was in *McCollum* (333 U. S., [fol. 136] at p. 212). As in that case, so here, pupils com-[fol. 136]-pelled by law to go to school for secular education, *are released for an hour on condition that they attend religious classes.* Accordingly, there is no denying that the program enables religious denominations to divert to sectarian instruction pupils assembled, and time set aside, for secular education by the state's compulsory attendance laws. Moreover, while it is true that the regulations prohibit comment on a pupil's failure to attend the religious classes, the program itself seems bound to exert certain inherent pressures on the pupils to attend. For one thing, there results an inevitable feeling of "separatism" in pupils "left behind"—to avoid which, few will hesitate to conform to the practices of their fellow students (333 U. S., at p. 227). In addition, the release from the obligation to attend public school for the one hour a week is unquestionably an inducement to register for such courses, for, it has been observed, religious instruction can compete more successfully with arithmetic than with recreation.

The co-operation of the public school system further serves to assure the attendance at the religious classes of the pupils enrolled therein. The regulations require that "Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week", together with a statement of the reason for any absence. Knowledge that an official record is kept of his attendance necessarily places pressure on the child—accustomed as he is to the discipline of school—to attend these religious classes.

Indeed, the entire vitality of the program lies in the prestige, planning, co-operation and assistance lent by the public school system, which is exactly that fusion and integration of state and religion prohibited by the First Amendment as interpreted by the Supreme Court. While, therefore, there may here be no use of public school buildings and—I am willing to assume—no use of public school funds and but little of the time of public school personnel, no one may dispute that the state affords sectarian groups

"invaluable aid" in helping to provide pupils for their religious classes through the use of its compulsory public school machinery. This is more than a "friendly gesture" —the phrase is Judge Froessel's—between Church and State. If "Separation means separation, not something [fol. 137] less", if the relation between Church and State is "a 'wall * * *' not * * * a fine line easily overstepped" (per Frankfurter, J., concurring, 333 U. S., at p. 231), then, certainly, the New York City program violates the First Amendment.

And, as was true of the Champaign plan, so here in this case, the program is necessarily divisive in its effect. As Justice Frankfurter forcefully noted:

"Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages. [pp. 227-228]

"Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other

than religious, leaving to the individual's church and home, indoctrination in the faith of his choice. [pp. 216-217]"

Present a program where some children are released from their usual attendance at public school on condition that they attend courses in religious observance and education under the control of duly constituted religious bodies, it cannot matter, insofar as the impact of the First Amend-[fol. 138] ment is concerned, that such religious instruction is given off the school grounds. What is vital and operative is, not where the religious teaching is given, but that it secures its pupils through the instrumentality of the state and through the machinery and momentum of the public school system. No one disputes the power of the legislature to shorten the school day so as to afford greater opportunity for week-day religious instruction, but it may not go beyond that and lend its aid to coerce or encourage enrollment for such instruction. There is a vital distinction between coercion and what the court chooses to term "an accommodation" between "constitutional prohibitions and the right of parental control over children." (Opinion of Judge Froessel, *supra*, p. 172.)

In sum, then, what the First Amendment forbids is the fusing, through state action, of the secular and the sectarian in the field of public education. The circumstance that any sect may participate in the program is immaterial. It is not discrimination alone that the Constitution prohibits; as the Supreme Court made indisputably clear, neither the state nor its public schools may be used to "'aid one religion, aid all religions, or prefer one religion over another.'" (333 U. S. 203, 210-211.)

I perceive no merit in the contention for which *Pierce* v. *Society of Sisters* (268 U. S. 510), is cited—that a challenge to the released time program is a challenge to the right of parents to control the rearing and education of their children. More specifically, it is urged that, if a parent may insist upon the complete "release" of a child from any attendance at a public school so as to permit him to pursue his studies in a parochial school, the parent has, *a fortiori*, a right to insist on the release of the child for but a small percentage of school time.

The argument goes too far. It assumes that, even though the child is enrolled in a public school, the parent has a

constitutional right to remove him therefrom for any period and at any time for instruction in sectarian religious courses. The *Pierce* case stands for no such proposition. The Supreme Court there held only that the state cannot constitutionally prevent parents from determining for themselves where their children shall be educated and whether that education shall be sectarian or nonsectarian. No one [fol. 139] questions the right of parents to send their children to private or parochial schools of their own choosing. Parents do not, however, have any constitutional right to interfere with the functioning of the public school system or to demand that it serve as an adjunct to a plan of religious instruction. Moreover, what the *McCollum* case concerned itself with, and what is here involved, is not the right of a parent, but rather a basic limitation on the power of the state. The *McCollum* case, as we have noted, invoked the doctrine of separation, not against the parent's right, but against the state's power, and held that the state may not commingle a program of religious instruction with the secular education given in its public schools. Nothing in the *Pierce* case either negates that doctrine or suggests a contrary conclusion.

It may well be that there are children growing up untutored in matters religious and, if that be so, it is a matter for grave concern. Considerations of fundamental principle, however, are involved when an attempt is made to enable religious groups to cure that lack through the instrumentality of the public school. Our constitutional policy, it has been said, "does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the [First] Amendment itself.

"It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education, that the Constitution forbids it to do so." (RUTLEDGE, J., dissenting in *Everson* v. *Board of Educ., supra,* 330 U. S., at p. 52.)

Nor may the released time program be justified as merely another application of the immemorial and unchallenged [fol. 140] practice of releasing children from school attendance to permit them to observe their religious Holy Days. The suggested analogy confuses two entirely different and distinct matters. Religious observance of Holy Days necessarily requires attendance at church or temple at stated times which may coincide with the hours otherwise prescribed by law for school attendance. To refuse to excuse children for such religious observance would be a restraint of that freedom of religion, an interference with that liberty of worship, which the Constitution guarantees. (Cf. *West Virginia State Bd. of Educ.* v. *Barnette,* 319 U. S. 624, *passim.*) Obviously, no such issue is here involved.

*People ex rel. Lewis* v. *Graves* (245 N. Y. 195), upon which respondents heavily rely, did involve a scheme for released time for religious instruction somewhat similar to the one before us: on the written request of the parent alone—and not, as in this case, by a clergyman of a "duly constituted religious body" as well—the child was released for a half hour a week of what would normally have been a study session at school. However, in view of the Supreme Court's interpretation in the *McCollum* case of the controlling First Amendment, the *Lewis* case can no longer be deemed decisive, and no useful purpose is served by considering whether an appraisal of the factual differences between the New York City program and the White Plains program in the *Lewis* case would make the *Lewis* decision inapplicable even under the Constitution of New York State. In addition, and I mention it in passing, the petitioner in the *Lewis* case relied upon article IX, section 4 (now art. XI, § 4) of the State Constitution, and neither the court nor any of the parties even referred to the constitutional provision (art. I, § 3) here invoked.

It is impossible to justify the determination made below that the petition be dismissed for insufficiency. At the

very least, there should be a trial to afford petitioners an opportunity to establish by proof, if they can, such allegations as those that assert the "close cooperation" between public school authorities and those conducting the classes in religious instruction; the use of public school machinery and the time of public school personnel "necessarily entailed" by the program; the "exercise of pressure and coercion" upon parents and children to secure attendance of children at such classes; the divisive nature of the pro-[fols. 141-142] gram; and the "unlawful censorship of religion and preference in favor of certain religious sects" "effected" by the program. However, I believe—as did two of the justices in the Appellate Division—that, on the basis of statute, regulations and the admitted allegations of the petition, petitioners are entitled to a decision, on the pleadings, that the released time program under consideration falls within the ban of the Federal Constitution.

Time has taught, and the Supreme Court, by its *McCollum* decision has reaffirmed, the wisdom and necessity of maintaining "a wall * * * high and impregnable" between Church and State, between public school secular education and religious observance and teaching. Maintenance of that barrier was regarded by the Supreme Court, as earlier it had been by the Founding Fathers, not as a demonstration of hostility to religion, but rather as a means of assuring complete freedom of religious worship. In my opinion, the conclusion is inescapable that the released time program in New York City breaches that barrier.

Accordingly, I would reverse and direct entry of a final order granting the relief sought in the petition.

Lewis, Conway and Dye, JJ., concur with Froessel, J.; Loughran, Ch. J., concurs for affirmance upon the authority of *People ex rel. Lewis* v. *Graves* (245 N. Y. 195); Desmond, J., concurs for affirmance in a separate opinion; Fuld, J., dissents in opinion.

Order affirmed.

[fol. 143] In Court of Appeals, State of New York

In the Matter of the Application of Tessim Zorach & ano., Appellants, for an order &c.,

vs.

Andrew G. Clauson, Jr. & ors., constituting the Board of Education of the City of New York, & ano., &c., Respondents, directing them to discontinue certain school practices, and The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent

Remittitur—July 11, 1951

Be it remembered, that on the 13th day of April in the year of our Lord one thousand nine hundred and fifty-one, Tessim Zorach & ano., the appellants in this cause, came here unto the Court of Appeals, by Kenneth W. Greenawalt, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Andrew G. Clauson, Jr. & ors., constituting the Board of Education of the City of New York, & ano. &c., the respondents and The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, the intervenor-respondent—in said cause, afterwards appeared in said Court of Appeals [fol. 144] by John P. McGrath, Nathaniel L. Goldstein, Attorney General, and Charles H. Tuttle, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Kenneth W. Greenawalt, of counsel for the appellants, and by Messrs. Wendell P. Brown and Michael A. Castaldi, of counsel for the respondents, and by Messrs. Charles H. Tuttle and Porter R. Chandler, of counsel for the intervenor-respondent, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records afore-

said, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

[fols. 145-146] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 147] In Supreme Court of State of New York

[Title omitted]

Order on Remittitur—July 27, 1951

The petitioners above named having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the office of the Clerk of said Appellate Division on the 15th day of January 1951, which said order affirmed a final order of the Supreme Court, Kings County, entered in the office of the Clerk of the County of Kings on the 24th day of June 1950, [fol. 148] and the said appeal having been argued at the Court of Appeals by Kenneth W. Greenawalt, attorney for petitioners-appellants, by Wendell P. Brown, Solicitor General, of counsel for the respondent Commissioner of Education of the State of New York, by Michael A. Castaldi, Assistant Corporation Counsel of the City of New York, of counsel for the respondent Board of Education of the City of New York, and by Charles H. Tuttle and Porter R. Chandler, of counsel for the intervenor-respondent, The Greater New York Coordinating Committee on Released

Time of Jews, Protestants and Roman Catholics; and briefs *amici curiae* having been filed in the said Court of Appeals by Frank E. Karelsen, Jr. and David I. Ashe, attorneys for Public Education Association & ano., by Theodore Leskes, Will Maslow and Arnold Foster, attorneys for the American Jewish Committee and others, by R. Lawrence Siegel, for Committee on Academic Freedom of the American Civil Liberties Union & ano., all in support of petitioners-appellants' position, and by Orrin G. Judd and Robert McC. Marsh, attorneys for National Council of the Churches of Christ in the United States of America, in support of respondents' position; and after due deliberation the Court of Appeals having made its decision thereupon and having ordered and adjudged that the order of the Appellate Division of the Supreme Court so appealed from be affirmed, with costs, and having further ordered that the records and proceedings in that Court be remitted to the Supreme Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein dated July 11, 1951, and upon motion of Nathaniel L. Goldstein, Attorney General of the State of New York, attorney for respondent Commissioner of Education of the State of New York, John P. McGrath, Corporation Counsel of the City of New York, attorney for the respondent Board of Education of the City of New [fols. 149-150] York, and Charles H. Tuttle, attorney for intervenor-respondent The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, it is

Ordered That the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and it is further

Ordered That the said order of the Appellate Division of the Supreme Court, Second Judicial Department, so appealed from, be and the same hereby is, affirmed, with costs.

Enter.

J.S.C.

Granted July 27, 1951. F. J. Sinnott, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 151] IN COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

PETITION FOR APPEAL—September 19, 1951

The petitioners herein, Tessim Zorach and Esta Gluck considering themselves aggrieved by the order and judgment of the Court of Appeals of the State of New York entered on July 11, 1951;

Do Hereby Pray that an appeal be allowed to the Supreme Court of the United States from said final order and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made in respect of the appeal bond to be given by said petitioners and that the amount of security be fixed by the order allow-
[fol. 152] ing the appeal; and that the entire record, proceedings and papers upon which said final order and judgment was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Dated: New York, N. Y., September 19th, 1951.

Respectfully submitted, Kenneth W. Greenawalt, Attorney for Petitioners-Appellants, One Wall Street, New York 5, New York.

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[fol. 153] IN COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL—September 24, 1951

Tessim Zorach and Esta Gluck, the petitioners herein, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and order of the Court of Appeals of the State of New York in this cause filed on July 11, 1951, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United

States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

[fols. 154-155] Now, therefore, it is hereby ordered that the said appeal be and the same is hereby allowed as prayed for; and

It is further ordered that the appellants post a good and sufficient bond in the sum of $250.00 as security for costs of the appeal; and

It is further ordered that citations shall issue in accordance with law; and

It is further ordered that the Clerk of the Supreme Court of the State of New York, County of Kings, shall prepare and certify a transcript of the entire record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within forty (40) days of this date or within such time as may be specified by a further order of this Court.

John T. Loughran, Chief Judge of the Court of Appeals of the State of New York.

Dated: Albany, New York, September 24th, 1951.

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[fol. 156] Citation in usual form showing service on Nathaniel L. Goldstein, omitted in printing.

[fol. 157] In Court of Appeals, State of New York

[Title omitted]

Assignment of Errors—September 19, 1951

Tessim Zorach and Esta Gluck, petitioners in the above entitled cause, in connection with their appeal to the Supreme Court of the United States hereby submit and file the following assignment of errors, upon which they will rely in their prosecution of said appeal from the final judgment and order of the Court of Appeals of the State of New York entered July 11, 1951.

The Court of Appeals of the State of New York erred in the following respects:

[fol. 158] 1. In affirming the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which affirmed the final order of the Supreme Court of the State of New York, Kings County, which (a) dismissed petitioners' petition on the merits as a matter of law and denied in all respects petitioners' application for an order, directed against respondents requiring them to rescind their regulations and to cause the discontinuance of the released time program in operation, as prayed for in their petition and notice of motion; (b) denied in all respects petitioners' motion for an order directing a trial in respect of triable issues of fact raised by the pleadings; (c) sustained the objections of the respondents in point of law to the petition, i. e., that the petition failed to state facts sufficient to constitute a cause of action against either of the respondents; and (d) granted in all respects the motion of the intervenor-respondent for a final order dismissing the proceedings on the merits on the ground that the petition failed to state facts sufficient to constitute a cause of action.

2. In holding that Section 3210 of the Education Law of the State of New York, particularly Par. b, subdivision 1 thereof, and the regulations established pursuant to said statute by respondent Commissioner of Education of the State of New York and by respondent Board of Education of the City of New York, are not in violation of the First and Fourteenth Amendments of the United States Constitution and do not constitute laws respecting an establishment of religion or prohibiting the free exercise of religion.

[fol. 159] 3. In holding that the operation of the released time program in the New York City schools, either as such operation is described in petitioners' petition herein or as such operation is admitted by the respondents and intervenor in their pleadings herein, does not violate the First and Fourteenth Amendments of the United States Constitution and does not violate the prohibition against laws respecting an establishment of religion or prohibit the free exercise of religion.

4. In holding that the petitioners were not entitled in this proceeding and on the pleadings of all the parties, to a final order, on the merits, granting the relief prayed for in their petition, under the provisions of the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCollum* v. *Board of Education*, 333 U. S. 203.

5. In dismissing petitioners' petition on the merits as a matter of law; denying in all respects the petitioners' application for an order against respondents as prayed for under Article 78 of the New York Civil Practice Act; sustaining the objections of the respondents in point of law to the petition; granting in all respects the intervenor's motion for a final order dismissing the proceeding on the merits; and denying in all respects petitioners' motion for an order, in any event, directing a trial of triable issues of facts raised by the pleadings.

6. In holding that the petition of the petitioners in this proceeding did not state facts sufficient to constitute a cause of action and to entitle them to the relief prayed for, under the provisions of the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCollum* v. *Board of Education*, 333 U. S. 203.

[fol. 160] 7. In holding that the decision of the United States Supreme Court in the case of *McCollum* v. *Board of Education*, 333 U. S. 203, and the legal and constitutional principles stated and established therein were not controlling in the determination of the constitutional issues involved in this proceeding either as presented in petitioners' petition or as presented in the pleadings as a whole.

8. In holding that the decision of the New York Court of Appeals in *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, 198 (decided in 1927 in respect of a released time system operated in White Plains, N. Y. and before the U. S. Supreme Court had decided *McCollum* v. *Board of Education*, 333 U. S. 203 or had held the freedoms guaranteed by the First Amendment were protected by the Fourteenth Amendment against laws or acts of the several states or their agencies) was a binding and controlling precedent in the determination of the constitutional issues involved and presented in this proceeding.

9. In holding that there are radical or substantial differences in elements or respects that are constitutionally important and crucial between the "released time" program in operation in Champaign County, Illinois, prior to its invalidation as unconstitutional in *McCollum v. Board of Education*, 333 U. S. 203, and the "released time" program presently authorized and established by statute and by respondents' regulations and operated in the New York City public schools.

10. In holding that the invalidation and discontinuance, as unconstitutional under the First and Fourteenth Amendments of the United States Constitution, of the New York system of released time so authorized and established by state statute and respondents' regulations and so practiced in New York City public schools, would represent "'a government hostility to religion' which would be 'at war with our national tradition'." or would interfere with the free exercise of religion by anyone, or would interfere with [fol. 161] any legitimate right of parents to direct the rearing and education of their children under the doctrine of *Pierce v. Society of Sisters*, 268 U. S. 510 or under the laws and Constitution of the United States.

11. In failing to hold that the New York system or program of "released time", as authorized and established by Section 3210, Par. b, subdivision 1 of the Education Law of the State of New York, the regulations of the Commissioner of Education of the State of New York and the regulations of the Board of Education of the City of New York and as actually practiced and operated in the New York City public schools violates the First and Fourteenth Amendments of the United States Constitution in that such statutes, regulations and practices constitute a law respecting an establishment of religion and prohibiting the free exercise thereof.

12. In failing to hold that Section 3210, Par. b, subdivision 1 of the Education Law of the State of New York, and the regulations of respondent Commissioner of Education and respondent Board of Education established pursuant thereto, and the operation of the released time program in the New York City public schools constitute a law respecting an establishment of religion and prohibiting the free

exercise thereof in violation of the First and Fourteenth Amendments of the United States Constitution.

13. In failing to hold that the New York system of released time, as authorized and established by state statute and by respondents' regulations and as practiced and operated in the public schools in New York City is in violation of the constitutional requirement for a separation of church and state under the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCollum* v. *Board of Education*, 333 U. S. 203.

[fol. 162] 14. In failing to hold, within the principles laid down by the United States Supreme Court in *McCollum* v. *Board of Education*, 333 U. S. 203, that the New York system of "released time", as authorized and established by state statute and by regulations of the respondents and as practiced and operated in the public schools of New York City, is a system of "released time" in which (a) is involved the utilization of the state's tax-established and tax-supported public school system to aid religious groups to spread their faith and to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals; (b) is involved the close cooperation between public school authorities and a religious council in promoting religious education for public school children during public school hours on compulsory education time; (c) the operation of the state's compulsory education system assists and is integrated with the program of religious instruction carried on by separate religious sects; (d) pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes; (e) the state affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery; (f) the momentum of the whole public school atmosphere, planning and machinery is put behind the religious instruction; (g) the inevitable result is divisiveness among public school children and the exerting of pressure and coercion upon parents and such children to secure attendance by the children at classes for religious instruction; (h) state laws and state power aid

one, or some, or all religions and prefer one religion over another; (i) taxes are levied to support religious activities or institutions; and (j) there is not a separation of church and state.

[fol. 163] 15. In failing to hold that the New York system of released time, as so authorized and established by statute and respondents' regulations and as operated in the New York City schools, is not subject to the same constitutional infirmities that the United States Supreme Court found in the case of *McCollum* v. *Board of Education*, 333 U. S. 203, in respect of the system or program of "released time" theretofore operated in Champaign County, Illinois.

16. In failing to hold, on the basis of the state statute, the regulations of the respondents and the admitted allegations of the petition, that the petitioners were entitled, on the merits, to an order in this proceeding granting all the relief prayed for by them in their petition.

17. In failing to hold that the limiting of participation in the New York system of released time to "duly constituted religious bodies" effects unlawful censorship of religion and effects a preference in favor of certain religious sects in violation of the First and Fourteenth Amendments of the United States Constitution.

Wherefore, petitioners Zorach and Gluck pray that the final judgment and order of the Court of Appeals of the State of New York be reversed, and for such other relief as to the Court may seem fit and proper.

Kenneth W. Greenawalt, Attorney for Petitioners-Appellants, One Wall Street, New York 5, New York.

Dated: New York, N. Y., September 19th, 1951.

[fol. 164] In Court of Appeals, State of New York

[Title omitted]

Stipulation—September 28, 1951

To: Francis J. Sinnott, Esq., Clerk of the Supreme Court of The State of New York, County of Kings, Hall of Records, Brooklyn, New York.

It is hereby stipulated and agreed by and between the attorneys for the parties to the above entitled cause that the entire transcript of record, without exception, should be certified and transmitted to the Clerk of the Supreme Court of the United States, which entire transcript of record consists of the following:

1. All of the papers contained in the printed "Papers on Appeal" which were filed in the Court of Appeals of the State of New York.

[fols. 165-168] 2. Opinion of the Court of Appeals of the State of New York and the two concurring opinions and the dissenting opinion.

3. Remittitur of the Court of Appeals of the State of New York.

4. Order on remittitur.

5. Petition for appeal.

6. Order allowing appeal.

7. Citation on appeal.

8. Assignment of errors and prayer for reversal.

9. Statement of jurisdiction of the Supreme Court of the United States.

10. Statement of petitioners-appellants pursuant to Rule 12, paragraph 2, of the Rules of the Supreme Court of the United States.

11. Certificate of service of Papers on Appeal.

12. This stipulation.

Dated: New York, N. Y., September 28, 1951.

Kenneth W. Greenawalt, Attorney for Petitioners-Appellants; Nathaniel L. Goldstein, Attorney General of New York, Attorney for Respondent Commissioner of Education; Denis M. Hurley, Corporation Counsel of New York, Attorney for Respondent Board of Education; Charles H. Tuttle, Attorney for Intervenor-Respondent.

[fol. 169] Proof of service (omitted in printing).

[fol. 170] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED —December 26, 1951.

Appellants adopt for their Statement of Points on which they intend to rely in their appeal to this Court, the points contained in their Assignment of Errors heretofore filed herein.

Appellants designate the entire record as heretofore filed in the above entitled cause, as necessary for the consideration of the points relied upon and for printing by the Clerk of this Court.

Dated: New York, N. Y., December 26, 1951.

Kenneth W. Greenawalt, Attorney for Appellants, One Wall Street, New York 5, New York.

[fols. 171-172] To: Hon. Charles Elmore Cropley, Clerk, Supreme Court of the United States, Washington 13, D. C. Hon. Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Respondent Commissioner of Education, Albany, New York. Hon. Denis M. Hurley, Corporation Counsel of the City of New York, Attorney for Respondent Board of Education, Municipal Building, New York, New York. Charles H. Tuttle, Esq., Attorney for Intervenor-Respondent, 15 Broad Street, New York 5, New York.

[fol. 173] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 431

[Title omitted]

ORDER—December 11, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is assigned for argument immediately following No. 9, Doremus vs. Board of Education of the Borough of Hawthorne and the State of New Jersey.

(9186)